(1) No. 96-8516-CFH Title: Kenneth Eugene Bousley, Petitioner
v.
United States

Docketed: April 7, 1997 Court: United States Court of Appeals for the Eighth Circuit

Entry	Date	Proceedings and Orders
	Mar 18 1997	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due June 6, 1997)
	May 1 1997	Order extending time to file response to petition until June 6, 1997.
	Jun 6 1997	Brief of respondent United States filed.
	Jun 19 1997	DISTRIBUTED. September 29, 1997
	Sep 29 1997	Petition GRANTED. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, November 13, 1997. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, December 15, 1997. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, January 5, 1998. Rule 29.2 does not apply. SET FOR ARGUMENT March 3, 1998.
		**********
	Oct 10 1997	Motion of petitioner for appointment of counsel filed.
	Oct 15 1997	DISTRIBUTED. October 31, 1997 (Page 15)
	Nov 3 1997	Motion for appointment of counsel GRANTED and it is ordered that L. Marshall Smith, Esquire, of St. Paul, Minnesota, is appointed to serve as counsel for the petitioner in this case.
	Nov 10 1997	Joint appendix filed.
	Nov 12 1997	Brief amicus curiae of American Civil Liberties Union filed.
	Nov 12 1997	Brief of petitioner Kenneth Eugene Bousley filed.
	Nov 13 1997	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed.
	Nov 21 1997	Thomas C. Walsh, Esquire, of St. Louis, Missouri, inivited to brief and argue as amicus curiae in support of the judgment below.
	Dec 4 1997	Order extending time to file brief of respondent on the merits until December 22, 1997.
	Dec 22 1997	CIRCULATED.
	Dec 22 1997	Brief of respondent United States filed.
	Dec 23 1997	Motion of the Solicitor General to substitute the United States as respondent filed.
	Dec 30 1997	Motion of the Solicitor General for divided argument filed.
	Jan 5 1998	DISTRIBUTED. January 9, 1998 (Page 40)
	Jan 12 1998	Motion of the Solicitor General for divided argument GRANTED. to be divided as follows: petitioner - 20 minutes; the Solicitor General - 20 minutes; amicus curiae in support of judgment below - 20 minutes.
	Jan 12 1998	Motion of the Solicitor General to substitute the United States as respondent GRANTED.

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No. 96-8516-CFH

Entry	Date	Proceedings and Orders
	Jan 13 1998	Record filed.
	Jan 20 1998	Record filed.
	Jan 23 1998	Order further extending time to file brief of respondent on the merits until February 3, 1998.
	Feb 3 1998	Brief amicus curiae of Thomas C. Walsh filed at invitation of Court.
	Feb 13 1998	Reply brief of petitioner United States filed.
	Mar 3 1998	ARGUED.

No. 96-8516

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1996

KENNETH E. BOUSLEY,

Petitioner,

vs.

JOSEPH M. BROOKS, WARDEN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT (CORRECTED)

L. MARSHALL SMITH
2473 West 7th Street
Suite 307
St. Paul, MN 55116
(612) 636-6635
Counsel of Record

33 pp

(10)

QUESTIONS PRESENTED

1. Does this Court's decision in Bailey v. United States, apply retroactively, so that a defendant who pled guilty to a charge of using a firearm in violation of 18 U.S.C. § 924(c) is entitled to collateral relief upon proof that he was not told that the facts of his case do not amount to "use" under § 924(c)?

2. Does a guilty plea waive the defendant's right to attack his conviction, where a subsequent change in the law makes the facts upon which the plea was based non-criminal?

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1996

KENNETH E. BOUSLEY,

Petitioner,

vs.

JOSEPH M. BROOKS, WARDEN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner KENNETH E. BOUSLEY respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, which was entered October 3, 1996 and became final on December 18, 1996 when the Petition for Rehearing was denied.

OPINION BELOW

The Court of Appeals opinion reported at 97 F.3d 284, and is reproduced in the Appendix.

JURISDICTION

The final judgment of the Court of Appeals for the Eighth Circuit was entered December 18, 1996 when that court denied Petitioner's timely petition for rehearing.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Amendments to the United States Constitution.

Amendment V

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . .

Amendment VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

This case also involves the following statutes:

18 U.S.C. § 924(c)(1)

[W]hoever, during and in relation to any . . . drug trafficking crime, . . . uses or carries a firearm" is subject to imprisonment for five years.

28 U.S.C. § 2255

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
A motion for such relief may be made at any time.

. . . .

If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

STATEMENT OF THE CASE

I. PROCEEDINGS BELOW

Petitioner Kenneth Bousley pled guilty in 1990 in federal court, District of Minnesota, to a charge of violating 18 U.S.C. § 924(c)(1). At the same time, he also pled guilty to a violation of 18 U.S.C. § 341(A)(1). He was sentenced on both charges at the same time, and has served the requisite time in custody on his sentence under 18 U.S.C. § 341(A)(1).

Petitioner unsuccessfully appealed his § 341(A)(1) conviction (United States v. Bousley, No. 90-5598 (8th Cir. Sept. 25, 1991).

On July 5, 1994, Petitioner filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241, which was treated by the district court as a motion to vacate sentence under 28 U.S.C. § 2255. The district court denied the petition, and Petitioner appealed pro se to the Eighth Circuit.

While Petitioner's appeal was pending, this Court decided Bailey v. United States, 116 S. Ct. 501, 133 L. Ed. 2d 472 (1995), which changed the rule of the Eighth Circuit regarding the proper construction of 18 U.S.C. § 924(c)(1) by effectively overruling cases such as United States v. Brett, 872 F.2d 1365 (8th Cir. 1989), cert. denied 110 S.Ct. 322 (1989) and United States v. Matra, 841 F.2d 837 (8th Cir. 1988). Subsequently, present counsel was appointed to represent Petitioner and supplemental briefing was filed. Following oral argument, the district court ruling denying relief was affirmed. United States v. Bousley, 97 F.3d 284 (8th Cir. 1996).

II. STATEMENT OF FACTS

On March 19, 1990, police officers executed a search warrant at Bousley's home in Minneapolis, Minnesota. The officers found two coolers in Bousley's garage. Inside the coolers were two briefcases containing approximately seven pounds (3,153 grams) of methamphetamine. One of the coolers also contained two loaded handguns and one unloaded handgun. A coffee can in the garage contained an additional 33 grams of methamphetamine. The officers found another 6.9 grams of methamphetamine and two loaded handguns in Bousley's bedroom. There was no evidence that Bousley had carried or used any of these guns at any time in connection with drug trafficking.

Bousley was charged with possession of methamphetamine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1), and

with use of a firearm in relation to a drug offense pursuant to 28 U.S.C. § 924(c). Bousley admitted that he had been selling methamphetamine from his garage. He also admitted knowledge of the drugs and firearms in his bedroom, as well as of the drugs found in the coffee can in the garage. Bousley disclaimed knowledge of the drugs and firearms found inside the two coolers.

Bousley entered a plea of guilty to both the drug and firearms charges. With respect to the drug charge, the plea agreement stated the following:

> 4. There is no limit on the term of imprisonment that the Court may impose and the defendant agrees to be sentenced in accordance with the applicable Sentencing Guidelines. The defendant understands that a mandatory minimum penalty of ten years applies to the drug offense in the event the Court finds that the relevant conduct exceeds 100 grams of methamphetamine. [citation omitted]. He further understands that a mandatory five-year consecutive sentence applies to the gun offense. There is also no agreement as to fine, supervised release, or costs. The defendant agrees to pay the $50 special assessment.
>
> 5. Despite the fact that Count I carries a mandatory minimum penalty of ten years, the defendant is free to argue that the mandatory minimum does not apply because he did not knowingly possess more than 100 grams of methamphetamine with intent to distribute.
>
> . . . .
>
> The government, on the other hand, contends that the relevant conduct far exceeds the 100-gram threshold. The parties agree to allow the Court to resolve this dispute, which is a sentencing factor only, not an element of the offense.

In accordance with this agreement, the district court held an evidentiary hearing at which it received exhibits and took testimony from Bousley and FBI Special Agent Michael Kelly, who had interviewed Bousley after his arrest. Based on the hearing

and on Bousley's presentence report, the district court determined that Bousley's sentence for the drug charge would be based on the 946.9 grams of methamphetamine found in Bousley's bedroom, in the coffee can, and in one of the two briefcases in the garage. The court decided not to consider the approximately five pounds of drugs found in the second briefcase in determining the relevant conduct for which Bousley was accountable. The court sentenced Bousley to a term of seventy-eight months for the section 841(a)(1) drug charge and to a consecutive mandatory sixty-month sentence under § 924(c) for use of the firearms in relation to the drug offense.

Bousley appealed his sentence under the drug charge and the court of appeals affirmed. United States v. Bousley, 950 F.2d 727 (8th Cir. 1991).

Subsequently, Bousley filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241, which was treated by the district court as a motion to vacate sentence under 28 U.S.C. § 2255. Bousley alleged in the petition (1) that his plea of guilty to the section 924(c) firearms charge was not supported by an adequate factual basis; and (2) that section 924(c) is unconstitutionally vague. The district court denied the petition, and Petitioner appealed pro se to the Eighth Circuit. Bailey, supra, was decided in the meantime.

On appeal, the Eight Circuit affirmed, taking the position that Petitioner had "waived" his right to attack his guilty plea. The court held:

> The [district] court also advised Bousley that a guilty plea would foreclose an appeal of his conviction, and Bousley indicated that he understood this. Bousley was fully advised of his rights and understood that he was waiving those rights by pleading guilty. Because there is no indication that Bousley's plea was involuntary or uninformed, he has waived the right to collateral review of his conviction. 97 F.3d at 288.

The court acknowledged that its holding was directly contrary to United States v. Barnhardt, 93 F.3d 706 (10th Cir. 1996). 97 F.3d at 288.

REASONS FOR GRANTING CERTIORARI

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT BETWEEN CIRCUITS REGARDING THE RETROACTIVE APPLICATION OF BAILEY

This Court's decision in Bailey v. United States, 116 S. Ct. 501, 133 L. Ed. 2d 472 (1995) squarely holds that a defendant who has merely possessed guns near drugs and drug proceeds cannot be charged or convicted under 18 U.S.C. § 924(c)(1). Unresolved, however is the question whether Bailey should be applied in cases where defendants entered guilty pleas after being advised that such conduct did violate § 924(c)(1).

In United States v. Barnhardt, 93 F.3d 706 (10th Cir. 1996), the Tenth Circuit held that a defendant may collaterally attack his guilty plea if the facts he pled to are subsequently determined not to be criminal. A number of district court decisions have taken the same view; e.g., United States v. Fletcher, 919 F. Supp. 384, 387 (D. Kan. 1996). These cases rely upon this Court's holding in Blackledge v. Perry, 417 U.S. 21 (1974) for the proposition that one never waives the right to

challenge a conviction when he had the right not to be haled into court at all. Taking a similar approach is the Ninth Circuit, in United States v.McJoy, No. 95-15565, 1996 U.S. App. LEXIS 24347 (9th Cir. September 10, 1996). These cases rest on the foundation of the constitutional guarantees of due process of law and the right to be informed of the charges one faces before entering a plea.

The contrary view is reflected in the Eighth Circuit's opinion in this case. Citing United States v. Broce, 488 U.S. 563 (1989), the circuit court held that Petitioner's guilty plea waived his right to challenge the conviction despite the holding of Bailey. 97 F.3d 284, 287. This decision has been followed in district court cases such as United States v. Wallace, No. 92-00347, 1996 U.S. Dist. LEXIS 19062 (Dec. 23, 1996). These cases do not clearly address the due process concerns addressed in Blackledge, nor do they deal with the ruling announced in Broce that a guilty plea does not waive the claim that defendant's guilty plea must be based on an accurate explanation of the law in order to be valid. 488 U.S. 563, 574-75. Instead, they greatly expand the concept of waiver, adopting the opinion an ill-constructed version of the doctrine of procedural default. The analysis ignores the fact that procedural default derives from the doctrine of adequate and independent state grounds as applied in 28 U.S.C. § 2254 habeas corpus proceedings. Compare Schlup v. Delo, 115 S.Ct. 860 (1995) with the opinion below, 97 F.3d at 287-288.

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE UNEQUAL AND INCONSISTENT APPLICATION OF THE LAW IN THE WAKE OF BAILEY

The uncertainty surrounding Bailey's application is further reflected in other district and circuit court cases. In some instances, the government has conceded that Bailey applies and entitles the petitioner to relief. See, e.g., Abreu v. United States, 922 F.Supp. 203 (E.D. Va. 1996), United States v. Barron, 940 F. Supp. 1489 (D. Alaska 1996). In others such as this one and Bell v. United States, 917 F.Supp. 618 (E.D. Mo. 1996) the government has taken the opposite view. As a result, some prisoners have been released and others permitted to withdraw their guilty pleas, while other prisoners whose conduct was virtually identical are left in prison for conduct that is not criminal.

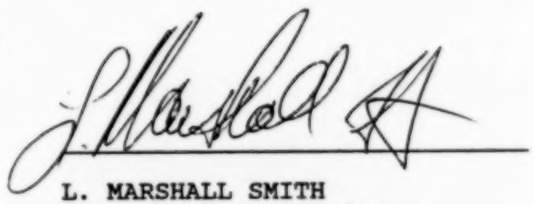
Furthermore, cases such as United States v. Andrade, 83 F.3d 729 (5th Cir. 1996) and United States v. Binford, No. 96-2419, 1997 U.S. App. LEXIS 3792 (7th Cir. March 4, 1997) decided on direct appeal have led to relief under Bailey for prisoners, while this case and others that follow it would deny relief on procedural technicalities to similarly situated petitioners seeking relief under § 2255.

The integrity of the judicial system requires that some consistency be imposed on the chaotic manner in which courts are applying the Bailey ruling. Certiorari should be granted to resolve the uncertainty and provide guidance to attorneys and district and circuit courts on these important issues.

CONCLUSION

For the reasons stated above, this petition is well taken and should be granted.

Dated: March 18, 1997



L. MARSHALL SMITH
Attorney for Petitioner

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1996

KENNETH E. BOUSLEY,

Petitioner,

vs.

JOSEPH M. BROOKS, WARDEN,

Respondent.

CORRECTED APPENDIX to Petition For A Writ Of Certiorari To The United States Court of Appeals For The Eighth Circuit

CONTENTS

Kenneth Eugene Bousley, Appellant, v. Joseph M. Brooks, Warden, Appellee.
No. 95-2687
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT
97 F.3d 284; 1996 U.S. App. LEXIS 26008

July 26, 1996, Submitted
October 3, 1996, Filed

Rehearing Denied December 18, 1996, Reported at: <=1> 1996 U.S. App. LEXIS 33549.

PRIOR HISTORY: Appeal from the United States District Court for the District of Minnesota. CIV 5-94-87. Honorable David S. Doty.

97 F.3d 284, *; 1996 U.S. App. LEXIS 26008, **1

DISPOSITION: Affirmed.

[*286] BEAM, Circuit Judge.

Kenneth E. Bousley was convicted in 1990, upon a plea of guilty, for drug trafficking and use of a firearm in relation to a drug offense. He now appeals from the district court's n1 dismissal of his <=2> 28 U.S.C. § 2255 habeas corpus petition. We affirm.

----------Footnotes----------

n1 The Honorable David S. Doty, United States District Judge for the District of Minnesota, adopting the recommendations of the Honorable Raymond L. Erickson, United States Magistrate Judge for the District of Minnesota.

----------End Footnotes----------

I. BACKGROUND

On March 19, 1990, police officers executed a search warrant at Bousley's home in Minneapolis, Minnesota. The officers found two coolers in Bousley's garage. Inside the coolers were two briefcases containing approximately seven pounds (3,153 grams) of methamphetamine. One of the coolers also contained two loaded handguns and one unloaded handgun. [**2] A coffee can in the garage contained an additional 33 grams of methamphetamine. The officers found another 6.9 grams of methamphetamine and two loaded handguns in Bousley's bedroom.

Bousley was charged with possession of methamphetamine with intent to distribute, in violation of <=3> 21 U.S.C. § 841(a)(1), and with use of a firearm in relation to a drug offense pursuant to <=4> 28 U.S.C. § 924(c). Bousley admitted that he had been selling methamphetamine from his garage. He also admitted knowledge of the drugs and firearms in his bedroom, as well as of the drugs found in the coffee can in the garage. Bousley disclaimed knowledge of the drugs and firearms found inside the two coolers.

Bousley entered a plea of guilty to both the drug and firearms charges. The plea agreement stipulated that Bousley could challenge the amount of drugs that would be used to determine his sentence. In accordance with this agreement, the district court held an evidentiary hearing at which it received exhibits and took testimony from Bousley and FBI Special Agent Michael Kelly, who had interviewed Bousley after his arrest. Based on the hearing and on Bousley's presentence report, the district court determined that [**3] Bousley's sentence for the drug charge would be based on the 946.9 grams of methamphetamine found in Bousley's bedroom, in the coffee can, and in one of the two briefcases in the garage. The court decided not to consider the approximately five pounds of drugs found in the second briefcase in determining the relevant conduct for which Bousley was accountable. The court sentenced Bousley to a term of seventy-eight months for the section 841(a)(1) drug charge and to a consecutive mandatory sixty-month sentence under § 924(c) for use of the firearms in relation to the drug offense.

Bousley appealed his sentence under the drug charge. This court affirmed. <=5> United States v. Bousley, 950 F.2d 727 (8th Cir. 1991). Bousley then brought this habeas corpus action pursuant to <=6> 28 U.S.C. § 2255. Bousley claims: (1) that his plea of guilty to the section 924(c) firearms charge is not supported by an adequate factual basis; and (2) that section 924(c) is unconstitutionally vague. The district court dismissed the petition and Bousley appeals. After Bousley filed his appeal, the United States Supreme Court clarified the scope of section 924(c) in <=7> Bailey v. United States, 133 L. Ed. 2d 472, 116 S. Ct. 501 [**4] (1995). Bousley then supplemented his brief, arguing that Bailey requires us to set aside his guilty plea.

[*287] II. DISCUSSION

We review the district court's dismissal of Bousley's section 2255 petition de novo. <=8> Holloway v. United States, 960 F.2d 1348, 1351 (8th Cir. 1992). In the proceedings below, the government argued that Bousley waived his right to challenge his conviction in a collateral action because he failed to preserve this issue in his prior appeal. While the district court considered the merits of Bousley's claims in dismissing the petition, we find the waiver issue

dispositive.

A. Waiver

A petitioner who fails to raise an issue on direct appeal is thereafter barred from raising that issue for the first time in a section 2255 habeas corpus proceeding. <=9> Reid v. United States, 976 F.2d 446, 447 (8th Cir. 1992), cert. denied, <=10> 507 U.S. 945, 122 L. Ed. 2d 732, 113 S. Ct. 1351 (1993) (citing <=11> United States v. Frady, 456 U.S. 152, 165, 71 L. Ed. 2d 816, 102 S. Ct. 1584 (1982)). Such a waiver applies to convictions pursuant to plea agreements as well as to those rendered after trial. <=12> 976 F.2d at 448 (defendant convicted of section 924(c) violation after nolo contendere plea pursuant to a plea agreement [**5] is barred from challenging conviction in section 2255 action). A petitioner is excused from a procedural default only if he can show both (1) a cause that excuses the default, and (2) actual prejudice from the errors that are asserted. Id.

In his prior appeal, Bousley challenged only the propriety of the sentence imposed for his possession of methamphetamine. Bousley, No. 90-5598, slip op. at 1. Bousley did not appeal the adequacy of the factual basis of his guilty plea, nor did he argue that section 924(c) is unconstitutionally vague. Absent a showing of cause and prejudice, Bousley may not now bring these claims through collateral attack.

Bousley argues that he is not barred from collaterally challenging his conviction, despite his default, because of the Supreme Court's ruling in Bailey. In Bailey, the Court held that "use" of a firearm under section 924(c) requires a showing of "active employment" of the firearm, a more stringent standard than this Circuit had previously applied. <=13> Bailey, 116 S. Ct. at 505. Bousley argues that because neither he nor his counsel could have foreseen the decision in Bailey, he has not waived a challenge to his conviction. [**6]

We disagree. This court recently held in <=14> United States v. McKinney, 79 F.3d 105, 109 (8th Cir. 1996), that Bailey does not resurrect a challenge to a section 924(c) conviction that has been procedurally defaulted. n2 The defendant in McKinney had been convicted after trial, rather than, as here, upon a guilty plea. <=15> Id. at 107. However, Bousley's plea cannot excuse his procedural default. Indeed, a defendant who enters a guilty plea with no conditions as to guilt "waives all challenges to the prosecution of his or her case except for those related to jurisdiction." <=16> United States v. Jennings, 12 F.3d 836, 839 (8th Cir. 1994) (citing <=17> Smith v. United States, 876 F.2d 655, 657 (8th Cir.), cert. denied, <=18> 493 U.S. 869, 110 S.

Ct. 195, 107 L. Ed. 2d 149 (1989)). Collateral review of a guilty plea is therefore "ordinarily confined to whether the underlying plea was both counseled and voluntary." <=19> United States v. Broce, 488 U.S. 563, 569, 102 L. Ed. 2d 927, 109 S. Ct. 757 (1989).

----------Footnotes----------

n2 In urging that "Bailey should be held retroactively applicable to [his section] 2255 motion," Bousley claims that McKinney "is alone in denying relief under Bailey to appellants with pending cases . . . and would set this court alone against all other courts that have addressed the issue." Supplemental Brief of Appellant at 3, 5. As an initial matter, a panel of this court is not free to disregard another panel decision. <=20> Smith v. Copeland, 87 F.3d 265, 269 (8th Cir. 1996). Even were we able to do so, Bousley's assertion is groundless. The retroactive effect of Bailey is a distinct issue from whether a defendant has waived the right to collateral review by failing to preserve an issue on appeal. This court has not hesitated to remand section 924(c) convictions for reconsideration in light of Bailey when the defendant preserved the issue by properly challenging the conviction on direct appeal. See, e.g., <=21> United States v. Webster, 84 F.3d 1056, 1066-68 (8th Cir. 1996).

----------End Footnotes----------

[**7]

As this case illustrates, a plea agreement is a process of negotiation and concession. Bousley pleaded guilty, but was afforded by stipulation in the plea agreement the opportunity [*288] to contest the amount of methamphetamine for which he would be held accountable. This concession allowed the district court to determine that it would not consider for sentencing purposes five pounds of the drugs found in Bousley's garage. We will not allow this process to be undone years after the fact, nor does Bousley cite any authority that compels us to upset the finality of such a plea agreement. n3 We are therefore convinced that procedural default and waiver apply to those convictions that follow a guilty plea no less than to those that follow a trial. n4

----------Footnotes----------

n3 Bousley argues that <=22> Davis v. United States, 417 U.S. 333, 41 L. Ed. 2d 109, 94 S. Ct. 2298 (1974), compels us to reopen his plea. As counsel conceded at oral argument, however, Davis involved a conviction after a trial and a direct appeal in which the petitioner presented the same issue raised later in his section 2255 action. This is a far cry from a collateral attack of

a conviction resulting from a plea agreement. [**8]

n4 We acknowledge that the Tenth Circuit in <=23> United States v. Barnhardt, 93 F.3d 706 (10th Cir. 1996) permitted a collateral attack on a section 924(c) conviction following a guilty plea. For the reasons discussed in the text, however, we decline to follow our sister circuit on this point.

----------End Footnotes----------

As the district court noted, the record shows that Bousley acknowledged ownership of at least some of the methamphetamine and firearms found in his garage and bedroom and admitted selling drugs from his garage. Before accepting Bousley's plea, the sentencing court meticulously advised Bousley of his rights to counsel and to a jury trial, explained that he would be subject to mandatory minimum sentences, and inquired whether Bousley had been threatened or pressured to plead guilty. The court also advised Bousley that a guilty plea would foreclose an appeal of his conviction, and Bousley indicated that he understood this. Bousley was fully advised of his rights and understood that he was waiving those rights by pleading guilty. Because there is no indication that Bousley's plea was involuntary or uninformed, [**9] he has waived the right to collateral review of his conviction unless he can show cause for his procedural default and resulting prejudice. <=24> Ford v. United States, 983 F.2d 897, 898 (8th Cir. 1993).

B. Cause and Prejudice

Bousley's only argument to excuse his default is that he received ineffective assistance of counsel during his plea and sentencing. See <=25> United States v. Ward, 55 F.3d 412, 413 (8th Cir. 1995) (citing <=26> Frady, 456 U.S. at 167-68) (ineffective assistance of counsel may constitute "cause" to excuse procedural default in a section 2255 action). Specifically, Bousley claims that his counsel failed to pursue a viable defense, was "prosecutorial" in examining him during his sentencing, refused to research existing law, and refused to honor Bousley's request to appeal his conviction under section 924(c).

We have carefully examined the record and find Bousley's arguments to be without merit. To be constitutionally deficient, counsel's performance must fall "below an objective standard of reasonableness." <=27> Strickland v. Washington, 466 U.S. 668, 688, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). In examining whether an attorney failed to meet this standard, "a court must indulge a strong presumption [**10] that counsel's conduct falls within the wide range of reasonable professional assistance." <=28> Id. at 689.

Other than the generalized assertions noted above, Bousley points to no instances in which counsel failed to adequately represent him, much less that his counsel's actions fell below the constitutional minimum Strickland requires. Bousley's counsel did recommend that Bousley not pursue an appeal of his section 924(c) conviction, but that recommendation was not unreasonable given counsel's understanding of this court's interpretation of section 924(c) before Bailey. In any event, counsel fully explained his reasons for declining to appeal the conviction to Bousley, and advised Bousley that he should seek other counsel if he was determined to press that issue on appeal. These actions do not rise to a constitutionally deficient level of unreasonableness.

Because Bousley has not shown that his counsel's representation fell below an objective [*289] standard of reasonableness, he has failed to establish that he received ineffective assistance from counsel. We therefore find no cause for Bousley's procedural default, and need not examine the "prejudice" element of Bousley's claim. [**11] Bousley has waived his right to collateral review of his section 924(c) conviction by pleading guilty and by failing to challenge the conviction on direct appeal.

III. CONCLUSION

For the foregoing reasons, we affirm the district court's dismissal of Bousley's petition.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 95-2687MND

Kenneth Eugene Bousley,

Appellant,

v.

Joseph M. Brooks, Warden,

Appellee.

Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

December 18, 1996

Order Entered at the Direction of the Court:

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIFTH DIVISION
Civil No. 5-94-87

Kenneth Eugene Bousley,
Reg. No. 04450-041,

Petitioner,

v.

Joseph M. Brooks, Warden,

Respondent.

ORDER

This matter is before the court upon petitioner's objections to a Report and Recommendation of United States Magistrate Judge Raymond L. Erickson dated March 14, 1995. Petitioner objects to the magistrate judge's recommendation that his Petition for a Writ of Habeas Corpus be dismissed.

Based upon a de novo review of the record herein, the court adopts Magistrate Judge Erickson's Report and Recommendation dated March 14, 1995. Accordingly, **IT IS HEREBY ORDERED** that the Petition for a Writ of Habeas Corpus is dismissed.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: May 18, 1995

David S. Doty, Judge
United States District Court

FILED MAY 22 1995
FRANCIS E. DOSAL, CLERK
Judgment Ent'd. MAY 22 1995
Deputy Clerk's Initials

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIFTH DIVISION

* * * * * * * * * * * * * * * * * * * *

Kenneth Eugene Bousley,
Reg. No. 04450-041,

Petitioner,

vs. REPORT AND RECOMMENDATION

Joseph M. Brooks, Warden,

Respondent. Civ. No. 5-94-87

* * * * * * * * * * * * * * * * * * * *

At Duluth, in the District of Minnesota, this 14th day of March, 1995.

I. Introduction

This matter came before the undersigned United States Magistrate Judge pursuant to a general assignment, made in accordance with the provisions of Title 28 U.S.C. §636(b)(1)(B), upon a Petition for a Writ of Habeas Corpus. The Petitioner has appeared pro se, and the Respondent has appeared by Jeffrey S. Paulsen, Assistant United States Attorney.

For reasons which follow, we recommend that the Petition for a Writ of Habeas Corpus be dismissed.

II. Procedural and Factual History

On June 15, 1990, in the United States District Court for the District of Minnesota, the Petitioner entered pleas of guilty on Counts I and II of a Superseding Indictment. In Count I, the Petitioner was charged with possessing, with an intent to distribute, methamphetamine, in violation of Title 21 U.S.C. §841(a)(1), while Count II charged him with using or carrying a firearm during and in relation to a drug trafficking offense, in violation of Title 18 U.S.C. §924(c).[1] These pleas were made during a Change of Plea Hearing.

On November 2, 1990, the District Court, the Honorable Diana E. Murphy presiding, sentenced the Petitioner to a term of 78 months for his conviction on Count I, to be followed by a consecutive sentence of 60 months for his conviction on Count II. The Petitioner is currently serving that sentence at the Federal Prison Camp at Duluth, Minnesota ("F.P.C., Duluth"). The Respondent is the Warden of that facility.

On July 5, 1994, the Petitioner filed this Petition for a Writ of Habeas Corpus, pursuant to Title 28 U.S.C. §2241, maintaining that there was an improper factual basis for his guilty plea on Count II of the Superseding Indictment. Necessarily, we treat the

[1] Title 18 U.S.C. §924(c) provides, where relevant here:

> Whoever, during and in relation to any crime of violence or drug trafficking crime * * * for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years * * *.

Petition as a Motion to Vacate a Sentence under Title 28 U.S.C. §2255.[2]

III. Discussion

The Petitioner does not challenge the propriety of the 78-month sentence that was entered upon his plea of guilty to the possession with intent charge. Rather, the Petitioner confines his challenge to the consecutive 60-month sentence that resulted from his plea of guilty to the charges of Count II. In this respect,

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[2]In light of the nature of the Petitioner's challenge and the nature of the relief he requests, on July 6, 1994, we issued a Report and Recommendation that the Petition be considered as a Section 2255 proceeding, and be reassigned from District Judge Michael J. Davis, to Chief Judge Diana E. Murphy, who had imposed the Petitioner's sentence. See, Title 28 U.S.C. §2255 (prisoner claiming that sentence is subject to collateral attack may move the Court "which imposed the sentence to vacate, set aside or correct the sentence"). On July 25, 1994, our Report and Recommendation was adopted by the District Court. Accordingly, we examine the Petitioner's claims in the context of Section 2255.

In support of such an examination, we would further note that Section 2255 has long been interpreted as providing a remedy "as broad as habeas corpus," with its purpose "to afford the same rights as in habeas corpus, but with jurisdiction confined to the sentencing court." Barkan v. United States, 341 F.2d 95, 96 (10th Cir. 1965), cert. denied, 381 U.S. 940 (1965). A Writ of Habeas Corpus under Section 2241 "is not an additional, alternative, or supplemental remedy to the relief afforded by motion in the sentencing court under Section 2255" but, rather, the Section 2255 remedy "supplants that of habeas corpus and is exclusive unless it is shown that it is inadequate or ineffective to test the legality of the prisoner's detention." Id. at 95-96; see also, Hill v. United States, 368 U.S. 424, 427 (1962) (Section 2255 remedy "exactly commensurate with that which had previously been available by habeas corpus in the court of the district where the petitioner was confined"); cf., United States v. Hayman, 342 U.S. 205, 219 (1952) ("nowhere in the [legislative] history of Section 2255 do we find any purpose to impinge upon prisoners' rights of collateral attack upon their convictions"); United States v. Giddings, 740 F.2d 770, 774 (9th Cir. 1984).

the Petitioner claims that the Sentencing Court accepted his guilty plea without establishing a factual basis for that plea, in violation of Rule 11(f), Federal Rules of Criminal Procedure. Specifically, the Petitioner asserts that "the plea allocution proffered by the petitioner was insufficient, since it did not indicate [a] connection between the firearms in the bedroom of the house, and the garage, where the drug trafficking occurred." Petition Attachment, at 5.

A. Standard of Review. Rule 11(f), Federal Rules of Criminal Procedure, provides as follows:

> Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

For the purposes of Rule 11(f), "a factual basis for a plea of guilty is established when the court determines there is sufficient evidence at the time of the plea upon which the court may reasonably determine that the defendant likely committed the offense." United States v. Marks, 38 F.3d 1009, 1012 (8th Cir. 1994); Gregory v. Solem, 774 F.2d 309, 312 (8th Cir. 1985), cert. denied, 475 U.S. 1088 (1986). The Rule requires the Sentencing Court to establish "that the conduct which the defendant admits constitutes the offense charged and that the Government has evidence from which a reasonable juror could conclude that the defendant was guilty as charged." United States v. Ford, 993 F.2d 249, 253 (D.C. Cir.

1993), citing Notes of Advisory Committee, Rule 11(f), Federal Rules of Criminal Procedure, 1966 Amendment.[3]

B. Legal Analysis. In determining whether the Sentencing Court complied with the requisites of Rule 11(f), we must consider the nature and elements of the offense upon which the Petitioner entered his plea of guilty. In order to establish guilt, Title 18 U.S.C. §924(c) requires proof of the following two separate elements:

> First, the prosecution must demonstrate that the defendant used or carried a firearm. Second, it must prove that the use or carrying was during and in relation to a drug trafficking crime.

United States v. Simms, 18 F.3d 588, 592 (8th Cir. 1994), quoting, Smith v. United States, --- U.S. ---, 113 S.Ct. 2050, 2053 (1993). With these elements of proof in mind, we note that, at the commencement of the Change of Plea Hearing, the Court accepted a plea agreement, that the Petitioner had signed and that detailed the sentencing stipulations. Petitioner's Exhibit B, Transcript to Hearing of June 15, 1990 ("Hearing Transcript"), at 2; Government's Exhibit A, Plea Agreement and Sentencing Stipulations. Those agreed upon stipulations included the following factual basis for the Petitioner's plea:

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[3]In fact, as long as there is a strong factual basis supporting a guilty plea, it is valid even if it is accompanied by claims of innocence -- a so-called "Alford plea." See, North Carolina v. Alford, 400 U.S. 25 (1970); White v. United States, 858 F.2d 416, 423 (8th Cir. 1988), cert. denied, 489 U.S. 1029 (1989), citing White Hawk v. Solem, 693 F.2d 825, 829 (8th Cir. 1982), cert. denied, 460 U.S. 1054 (1983).

> The parties also agree that, on or about March 19, 1990 * * * the defendant knowingly used firearms during and in relation to a drug-trafficking offense, namely the offense of possession with the intent to distribute methamphetamine. The following firearms were found in the [Petitioner]'s bedroom near the 6.9 grams of methamphetamine: a loaded Walther PBK .380 caliber handgun, serial number A016494; and a loaded .22 caliber Advantage Arms 4-shot revolver. The [Petitioner] admits ownership and possession of these two guns.

The Court also heard the Petitioner's sworn admission that he had been in possession of the 6.9 grams of methamphetamine that had been seized from his bedroom, and the 33 grams that had been uncovered in a coffee can in his garage. Transcript, at 12. He also testified that he planned on selling the methamphetamine that was contained in the coffee can. Id. Further, he admitted to having been in possession of the two firearms that had been seized from his bedroom, to the fact that the guns were found in close proximity to the methamphetamine, and to the fact that one of the guns had been loaded with ammunition. Id. at 14, 16. He also unqualifiedly acknowledged that seven pounds of methamphetamine, as well as three additional weapons, had been found in the garage upon the execution of the Search Warrant on March 19, 1990. Id. at 14-15.

Although the Petitioner denied that he had ever sold methamphetamine out of his house, he admitted that, in the past, he had trafficked that substance in his garage. Transcript, at 15. He denied that he kept the guns in his bedroom in order to assist in

a drug deal, but acknowledged that the guns "were there for protection." Id. In addition, he admitted that these same weapons "were available" if he had ever needed a firearm during his previous sales of illicit drugs. Id. Nevertheless, he maintained that "they weren't right out in the open, you know, I couldn't just reach over and grab it." Id. at 16.[1]

Based upon our thorough review of the Record before the Sentencing Court, as well as the Transcript of the Hearing at which the plea of guilty plea to Count II was accepted, we are satisfied that the Sentencing Court had an adequate factual basis for the plea, as is required by Rule 11(f). Generally, to be used "in relation to" a drug trafficking offense, the "firearm must have some purpose or effect with respect to the drug trafficking offense," and must at least "facilitate, or have the potential of facilitating, the drug trafficking offense." Smith v. United States, supra at 2059; United States v. Hughes, 15 F.3d 798, 803 (8th Cir. 1994); United States v. Mejia, 8 F.3d 3, 5 (8th Cir. 1993).

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[1]Also before the Court were the Receipt, Inventory and Return that had been completed by the officers who executed the Search Warrant at the Petitioner's residence on March 19, 1990. These documents corroborated his admissions by confirming that small baggies, which contained suspected methamphetamine, had been seized from a coffee can in his garage and in his master bedroom, and that two firearms -- a Walther PBK.380 caliber handgun and a .22 caliber Advantage Arms 4-shot revolver -- had been located in the same master bedroom. Petitioner's Exhibit D.

It is also well-settled in this Circuit that, in order to show that the Petitioner "used" the firearms in relation to his drug-trafficking activities, the Government need not prove that he was in actual possession of the firearm, or that he brandished or discharged it. United States v. Newton, 31 F.3d 611, 613 (8th Cir. 1994); United States v. Wolfe, 18 F.3d 634, 637 (8th Cir. 1994). Instead, the Jury need only find a sufficient nexus between the gun and the drug trafficking crime. United States v. Simms, supra at 592, citing United States v. Watson, 953 F.2d 406, 409 (8th Cir. 1992). Where, as here, the weapon was in close proximity to the drugs and was readily accessible, the evidence is sufficient to support a Section 924(c) conviction. See, United States v. Horne, 4 F.3d 579, 587 (8th Cir. 1994) (use of weapon includes "presence and ready availability" of firearm at residence), cert. denied, 114 S.Ct. 1121 (1994); United States v. Jones, 23 F.3d 1407, 1409 (8th Cir. 1994); United States v. Townsley, 929 F.2d 365, 368 (8th Cir. 1991).

The Petitioner complains that the guns were kept in his bedroom, and that his drug trafficking occurred in his garage, which was a "totally separate building." Memorandum, at 3. However, to establish the necessary nexus between the gun and the drug trafficking crime, "the gun need not 'be located in the room where the drug transaction occurs.'" United States v. Simms, supra at 592, quoting United States v. Horne, supra at 587. Instead, the controlling factor is whether the placement of the weapons supports

their ready accessibility if needed in an emergency. See, United States v. Boykin, 986 F.2d 270, 274 (8th Cir. 1993), cert. denied, 114 S.Ct. 241 (1994), citing United States v. Lyman, 892 F.2d 751, 754 n. 4 (8th Cir. 1989), cert. denied, 498 U.S. 810 (1990).

In applying these precepts, we reject the Petitioner's suggestion that his garage and bedroom -- which he alleges to be about 50 feet apart -- were too far distant to allow the necessary nexus which was an essential feature of his plea agreement. While the Petitioner has claimed that the guns were kept hidden in his bedroom principally to facilitate his girlfriend's protection, we find his other admissions at the Hearing of June 15, 1990, to the contrary. For instance, he testified that these weapons were available to him during his drug trafficking activities at his residence, if and when they were needed. Compare, United States v. Boucher, 909 F.2d 1170, 1175 (8th Cir. 1990), cert. denied, 498 U.S. 942 (1990). As a consequence, even if we account for the Petitioner's admitted ambulatory limitations -- owing to his artificial leg -- the firearms he stored in his bedroom served the purpose of assuring his safety, and the security of his premises, during the conduct of his illegal drug-related activities. This is the same bedroom as to which the Petitioner admitted to have stored 6.9 grams of methamphetamine. Accordingly, this evidence is wholly sufficient to establish the close proximity and the ready accessibility, which is needed to support a Section 924(c) conviction. United States of America v. Rockelman, No. 94-2222, Slip Op. at 8

(8th Cir. March 1, 1995); United States v. Horne, supra at 587; United States v. Jones, supra at 1409; United States v. Townsley, supra at 368. Thus, the Petitioner admitted to the Sentencing Court that he maintained weapons at his residence, which facilitated his drug transactions.

As his plea agreement makes clear, the Petition admitted his ownership of the two weapons that had been seized in his bedroom, and these weapons formed the basis of his voluntary plea of guilty to the Section 924(c) charges. Therefore, because the Petitioner's testimony before the Sentencing Court established a proper factual basis for his plea, and "[b]ecause the plea agreement's description of the essential facts underlying the charges supports a finding of guilt, we hold that [the Petitioner]'s acknowledgement of the accuracy of the plea agreement's provisions satisfies Rule 11's requirement that the court establish a factual basis for the defendant's guilt." United States v. Abdullah, 947 F.2d 306, 309 (8th Cir. 1991), cert. denied, 112 S.Ct. 1969 (1992).

WHEREFORE, It is --

RECOMMENDED:

That the Petition for a Writ of Habeas Corpus be dismissed.

Raymond L. Erickson
UNITED STATES MAGISTRATE JUDGE

ORIGINAL

No. 96-8516

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

KENNETH E. BOUSLEY

v.

JOSEPH M. BROOKS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether petitioner, who entered a guilty plea to a charge of using a firearm during and in relation to a drug trafficking offense in violation of 18 U.S.C. 924(c), may move pursuant to 28 U.S.C. 2255 to vacate his conviction in light of Bailey v. United States, 116 S. Ct. 501 (1995), even though he did not challenge the factual basis for his plea on direct appeal.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-6) is reported at 97 F.3d 284 (1996).

JURISDICTION

The judgment of the court of appeals was entered on October 3, 1996. A petition for rehearing was denied on December 18, 1996. The petition for a writ of certiorari was filed on March 18, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a plea of guilty in the United States District Court for the District of Minnesota, petitioner was convicted of

possession of methamphetamine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and use of a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c). He was sentenced to 78 months' imprisonment on the drug offense and a consecutive term of 60 months' imprisonment on the Section 924(c) charge. Petitioner appealed his sentence and the court of appeals affirmed. United States v. Bousley, 950 F.2d 727 (8th Cir. 1991) (Table).

Petitioner then filed a motion under 28 U.S.C. 2255, challenging the factual basis underlying his plea to the Section 924(c) charge.[1] The district court dismissed the petition, and the court of appeals affirmed. Pet. App. 1-6.

1. On March 19, 1990, police officers executed a search warrant at petitioner's house in Minneapolis, Minnesota. The officers found two coolers in the garage. Inside the coolers were two briefcases containing 3,153 grams of methamphetamine. One of the coolers also contained two loaded handguns and one unloaded handgun. A coffee can in the garage contained an additional 33 grams of methamphetamine. The officers found another 6.9 grams of methamphetamine and two loaded handguns in petitioner's bedroom. Pet. App. 1.

Petitioner was charged in a superseding indictment with possession of methamphetamine with intent to distribute it, in

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[1] Although petitioner styled his pleading as a petition for habeas corpus and named Joseph M. Brooks, the warden of the prison where he is incarcerated, as the defendant, the district court treated the petition as a motion under Section 2255.

violation of 21 U.S.C. 841(1)(a), and use of a firearm during and in relation to a drug offense, in violation of 18 U.S.C. 924(c). He entered a plea of guilty to both charges pursuant to a plea agreement that permitted him to challenge the amount of drugs used to determine his sentence. Pet. App. 2.

Petitioner's plea agreement contained the following stipulation regarding the factual basis for the plea:

> The parties also agree that, on or about March 19, 1990 * * * the defendant knowingly used firearms during and in relation to a drug-trafficking offense, namely the offense of possession with the intent to distribute methamphetamine. The following firearms were found in the [petitioner's] bedroom near the 6.9 grams of methamphetamine: a loaded Walther PBK .380 caliber handgun, serial number A016494; and a loaded .22 caliber Advantage Arms 4-shot revolver. The [petitioner] admits ownership and possession of these two guns.

Pet. C.A. Br. at A-7.

At the change of plea hearing, the district court asked petitioner what Count 2 charged him with, and petitioner responded that he had been charged with "possession of a firearm." Petitioner admitted to possession of two firearms that were seized from his bedroom and agreed that these guns were in close proximity to the 6.9 grams of methamphetamine (which he contended was for personal use). Petitioner denied that he kept the guns in his bedroom in order to assist in a drug deal, but acknowledged that they were "available" if he needed a firearm during his sales of illegal drugs. Tr. 6/15/90 Plea Hearing at 13-16.

Following an evidentiary hearing, the district court

determined that petitioner's sentence should be based on the 946.9 grams of methamphetamine found in his bedroom, in the coffee can, and in one of the two briefcases in the garage. On November 2, 1990, petitioner was sentenced to 78 months' imprisonment on the drug offense, and a consecutive term of 60 months' imprisonment on the Section 924(c) charge, to be followed by four years' supervised release.

2. Petitioner appealed from his sentence, contending that the district court had erred in determining the amount of methamphetamine for which he should be held accountable. Petitioner did not challenge the factual basis for his plea to the Section 924(c) charge. The court of appeals affirmed. United States v. Bousley, 950 F.2d 727 (8th Cir. 1991) (Table).

3. On July 5, 1994, petitioner filed a pro se petition for a writ of habeas corpus under 28 U.S.C. 2241, contending that his plea of guilty to the Section 924(c) charge was not supported by an adequate factual basis under Fed. R. Crim. P. 11(f) because he had not "used" the guns in his bedroom. Pet. C.A. Br. at A13-A16. A United States Magistrate Judge recommended that petitioner's pleading be dismissed. The Magistrate Judge's report concluded that there was a factual basis for petitioner's plea because the guns in his bedroom were in close proximity to drugs and were readily accessible. Id. at A2-A12. The district court adopted the Magistrate Judge's report and recommendation on May 18, 1995, and ordered that the petition be dismissed. Id. at A1.

4. Petitioner appealed. While his appeal was pending, this Court held, in Bailey v. United States, 116 S. Ct. 501 (1995), that the conviction of a defendant for use of a firearm under Section 924(c) "requires evidence sufficient to show an active employment of the firearm by the defendant." 116 S. Ct. at 505. Active employment includes uses such as "brandishing, displaying, bartering, striking with, and most obviously, firing or attempting to fire" the weapon. Id. at 508. By contrast, possession of a firearm -- without more -- does not constitute a "use," nor does "placement of a firearm to provide a sense of security or to embolden[.]" Ibid.

5. After Bailey was decided, the court of appeals appointed counsel to represent petitioner. Petitioner's attorney filed a supplemental brief arguing that petitioner's guilty plea should be vacated in light of Bailey. The court of appeals affirmed the district court's order dismissing petitioner's motion. Pet. App. 1-6. The court of appeals began by noting that petitioner had failed to challenge the factual basis for his Section 924(c) plea on his direct appeal. As a result, the court of appeals concluded, "[a]bsent a showing a cause and prejudice, Bousley may not now bring [this] claim[] through collateral attack." Id. at 3.

The court of appeals rejected petitioner's claim that his procedural default should be excused because neither he nor his counsel could have foreseen the Bailey decision. Citing United States v. McKinney, 79 F.3d 105, 109 (8th Cir. 1996), vacated and

remanded, No. 96-6348 (May 19, 1997), the court concluded that "Bailey does not resurrect a challenge to a section 924(c) conviction that has been procedurally defaulted." Id. at 3.

Nor, the court concluded, did petitioner's guilty plea excuse his procedural default. The court reasoned that "a defendant who enters a guilty plea with no conditions as to guilt 'waives all challenges to the prosecution of his or her case except for those related to jurisdiction.'" Id. at 3. The court noted that "a plea agreement is a process of negotiation and concession," and it declined to "allow this process to be undone years after the fact." Id. at 4. Accordingly, the court determined that "procedural default and waiver apply to those convictions that follow a guilty plea no less than to those that follow a trial." Ibid. Because the court found "no indication that petitioner's plea was involuntary or uninformed," it concluded that "he has waived his right to collateral review of his conviction unless he can show cause for his procedural default and resulting prejudice." Id. at 5 (citation omitted).

The court rejected petitioner's claim that his default should be excused because he received ineffective assistance of counsel during his plea and sentencing. In particular, the court concluded that petitioner's counsel did not act unreasonably in advising petitioner not to appeal from his Section 924(c) conviction, given counsel's understanding of the interpretation of Section 924(c) before Bailey. Accordingly, the court concluded that petitioner "has waived his right to collateral

review of his section 924(c) conviction by pleading guilty and by failing to challenge the conviction on direct appeal." Id. at 5-6.

DISCUSSION

Petitioner contends that the court of appeals erred in concluding that he has "waived" his right to challenge his conviction under Section 924(c) in light of Bailey. Pet. 7-9. In our view, although the court of appeals properly held that petitioner could not show cause and prejudice for failing to raise his claim before final judgment was entered on his guilty plea, the court erred in suggesting that his guilty plea waived his right to seek collateral review and in failing to inquire whether petitioner should be excused from showing cause and prejudice because he has made a colorable showing of "actual innocence." Accordingly, the judgment of the court of appeals should be vacated and the case remanded for further proceedings on that question.

1. The court of appeals stated that petitioner's claim was barred at least in part because he had entered a guilty plea. Pet. App. 2-6. It is well established that "[a] plea of guilty and the ensuing conviction comprehend all of the factual and legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence." United States v. Broce, 488 U.S. 563, 569 (1989). A defendant who pleads guilty "is convicted on his counseled admission in open court that he committed the crime charged against him." McMann v. Richardson, 397 U.S. 759, 773

(1970); see also Libretti v. United States, 116 S. Ct. 356, 362 (1995) (plea of guilty constitutes "a defendant's admission of guilt of a substantive criminal offense as charged in an indictment"); Tollett v. Henderson, 411 U.S. 258, 267 (1973) (guilty plea constitutes "admi[ssion] in open court that [defendant] is in fact guilty of the offense with which he is charged").

In light of those principles, the scope of review available on a post-conviction motion under 28 U.S.C. 2255 challenging a conviction entered on a guilty plea is narrow:

> [W]hen the judgment of conviction upon a guilty plea has become final and the offender seeks to reopen the proceeding, the inquiry is ordinarily confined to whether the underlying plea was both counseled and voluntary. If the answer is in the affirmative then the conviction and the plea, as a general rule, foreclose the collateral attack.

Broce, 488 U.S. at 569; see also Tollett v. Henderson, 411 U.S. at 266 ("The focus of federal habeas inquiry is the nature of the advice [of counsel] and the voluntariness of the plea."). Petitioner, however, contends that his guilty plea was involuntary. See Appellant's Supplemental C.A. Br. 5. As this Court has noted, a guilty plea "cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." McCarthy v. United States, 394 U.S. 459, 466 (1969). A guilty plea that is entered without adequate notice of the elements of the offense may therefore be challenged on a collateral attack. Henderson v. Morgan, 426 U.S. 637, 644 (1976).

Ordinarily, it is appropriate to presume that defense

counsel has explained the nature of the offense in sufficient detail to give the defendant notice of what he is being asked to admit. Henderson, 426 U.S. at 647; Marshall v. Lonberger, 459 U.S. 422, 436 (1983). Here, however, the transcript of the plea hearing shows that petitioner incorrectly believed that he could be convicted under Section 924(c) based solely on "possession" of a weapon. See p. 3, supra. That understanding was consistent with Eighth Circuit law before Bailey, and neither the court nor the prosecution said anything to disabuse petitioner of the view that possession of the firearm was illicit. As a result, petitioner had "such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt." Tollett, 426 U.S. at 644. Accordingly, assuming that petitioner can overcome his procedural default, petitioner may challenge his conviction on collateral attack notwithstanding his guilty plea.[2]

2. A defendant who brings a collateral challenge to his conviction on grounds not raised on direct appeal must ordinarily show both "cause" excusing his procedural default and "actual

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[2] Two courts of appeals have held that a guilty plea never bars a Bailey challenge to a Section 924(c) count on collateral attack. See United States v. Barnhardt, 93 F.3d 706 (10th Cir. 1996); Lee v. United States, 1997 WL 213972 at *2-*3 (7th Cir. Apr. 30, 1997). In addition to those cases, numerous courts of appeal have allowed post-Bailey challenges to Section 924(c) convictions on direct appeal following a guilty plea. See, e.g., United States v. Cruz-Rojas, 101 F.3d 283, 285-86 (2d Cir. 1996); United States v. Mitchell, 104 F.3d 649, 652 & n.2 (4th Cir. 1997); United States v. Andrade, 83 F.3d 729, 730-731 (5th Cir. 1996); United States v. Damico, 99 F.3d 1431 (7th Cir. 1996), cert. denied, 117 S. Ct. 1086 (1997); United States v. Staples, 85 F.3d 461 (9th Cir.), cert. denied, 117 S. Ct. 318 (1996).

prejudice" resulting from the error of which he complains. United States v. Frady, 456 U.S. 152, 168 (1982). The court of appeals correctly concluded that petitioner had failed to demonstrate cause for his procedural default. In a narrow class of cases, however, a defendant's procedural default does not bar his opportunity to raise a claim on a collateral challenge.[3]

This Court has held that even a defendant who is unable to show cause and prejudice may obtain "collateral review of his constitutional claims * * * if he falls within the 'narrow class of cases . . . implicating a fundamental miscarriage of justice.'" Schlup v. Delo, 115 S. Ct. 851, 861 (1995). A defendant may show that his is the "extraordinary case," id. at 864, that falls within that class by showing that a constitutional error "has probably resulted in the conviction of one who is actually innocent." Murray v. Carrier, 477 U.S. 478, 496 (1986).[4] See also Schlup, 116 S. Ct. at 865.

The court of appeals erred by failing to consider whether petitioner had made a sufficient showing of actual innocence to warrant reaching the merits of his constitutional claim, notwithstanding his failure to show and cause and prejudice. See

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[3] Other procedural rules governing collateral challenges may, however, still bar a defendant's claim. See, e.g., 28 U.S.C. 2255 (imposing 1-year statute of limitations on Section 2255 motions and limiting second or successive Section 2255 motions).

[4] Although petitioner did not expressly argue that his claim of innocence excused a showing of cause, his pro se brief on appeal both raised a claim of innocence and cited to Murray v. Carrier, 477 U.S. 478 (1986). See Pet. C.A. Br. at 2.

Pet. App. 3 (procedural default excused "only if" prisoner can show cause and prejudice). To satisfy that showing, petitioner must show not only that the guilty plea proceedings were defective, but he also must carry the burden of pointing to evidence already in the record -- or introducing new evidence if necessary -- that demonstrates that he is actually innocent of the offense of conviction.[5] Cf. Schlup, 115 S. Ct. at 867. The judgment of the court of appeals should therefore be vacated and the case should be remanded for further proceedings to determine whether the "actual innocence" standard is satisfied. Because the question whether petitioner has carried his burden has a large factual component, see Schlup, 115 S. Ct. at 868-869, the court of appeals may wish to remand this case for resolution of the "actual innocence" issue in the first instance by the district court.[6]

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[5] As noted above, see note 2, supra, two circuits have held that a guilty plea does not bar a defendant from mounting a collateral attack on his Section 924(c) conviction under Bailey. Insofar as those cases stand for the proposition that a guilty plea does not necessarily bar a collateral attack on a Section 924(c) conviction under Bailey, they are correct and consistent with the analysis in this Brief. Insofar as they are read to hold, however, that a defendant is automatically excused from a failure to show cause and prejudice when he brings a Bailey-based collateral attack on his conviction, in our view they are incorrect; to overcome a failure to show cause for a procedural default, a prisoner bringing a Bailey claim -- like a prisoner bringing any other claim -- must show that a miscarriage of justice would result by failing to consider the defaulted claim.

[6] Petitioner suggests (Pet. i, 7) that certiorari is warranted "to resolve the conflict between circuits regarding the retroactive application of Bailey." The decision below does not address the "retroactivity" of Bailey, however, and there is no conflict among the circuits on that issue. See Pet. App. 4 ("[t]he retroactive effect of Bailey is a distinct issue from

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded to the court of appeals for further proceedings to determine whether petitioner should be excused from his inability to show cause and prejudice for his failure to advance his constitutional claim on direct review.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

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Acting Assistant Attorney General

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Attorney

JUNE 1997

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whether a defendant has waived the right to collateral review by failing to preserve an issue on appeal.").

No. 96-8516

In The

Supreme Court of the United States

October Term, 1997

KENNETH E. BOUSLEY,

Petitioner,

vs.

JOSEPH M. BROOKS, WARDEN,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

JOINT APPENDIX

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Petition For Certiorari Filed March 18, 1997
Certiorari Granted September 29, 1997

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TERMED R/R

U.S. District Court
District of Minnesota (Duluth)

CIVIL DOCKET FOR CASE #:94-CV-87

Bousley v. Brooks — Filed: 07/05/94
Assigned to: Judge David S Doty
Referred to: Magistrate Judge Raymond L Erickson

Demand: $0,000 — Nature of Suit: 530
Lead Docket: None — Jurisdiction: US Defendant
Dkt# in other court: None

Cause: 28:2241 Petition for Writ of Habeas Corpus

KENNETH EUGENE BOUSLEY plaintiff	Kenneth Eugene Bousley #04450-041 [COR LD NTC] [PRO SE] Federal Prison Camp Box 1000 Duluth, MN 55814
v.	
JOSEPH M. BROOKS, Warden defendant	Jeffrey S Paulsen [COR LD NTC] US Atty Office 600 US Courthouse 300 4th St S Mpls, MN 55415 (612) 664-5600

7/5/94	1	APPLICATION AND ORDER (Magistrate Judge Franklin L Noel /6/30/94 granting ifp (copy mailed to petitioner) (cb)
7/5/94	2	FEDERAL PETITION FOR WRIT OF HABEAS CORPUS, together w/memorandum in support & exhibits –

		Assigned to Judge Michael J. Davis per habeas corpus list and referred to Magistrate Judge Raymond L. Erickson (cc: U S Atty) (Separate) (cb) [Edit date 06/21/95]
7/6/94	3	ORDER TO SHOW CAUSE (Magistrate Judge Raymond L. Erickson) rtble 20 days (cc: all counsel) (cb) [Entry date 07/07/94]
7/6/94	3	REPORT AND RECOMMENDATION (to judge Michael J. Davis) (Magistrate Judge Raymond L. Erickson / 7/6/94) RECOMMENDED: That this petition be reassigned for disposition to the Hon Diana E Murphy (cc: all counsel) (cb) [Entry date 07/07/94]
7/21/94	4	MOTION of the United States to dismiss (to Magistrate Judge Raymond L. Erickson), or in the alternative for summary judgment (to Magistrate Judge Raymond L. Erickson) (cb) [Entry date 07/25/94] [Edit date 05/22/95]
7/21/94	5	MEMORANDUM by United States in support of motion to dismiss (to Magistrate Judge Raymond L. Erickson) [4-1], of motion for summary judgment ((to Magistrate Judge Raymond L. Erickson) [4-2] (cb) [Entry date 07/25/94]
7/21/94	6	EXHIBITS to the memorandum in support of motion of the United States to dismiss petition for writ of habeas corpus (cb) [Entry date 07/25/94]
7/25/94	7	ORDER (Magistrate Judge Raymond L. Erickson / 7/25/94) The petr shall have until 8/15/94 in which to respond to respondent's submission requesting that

		the petition for a writ of habeas corpus be denied & the case dismissed. (cc: all counsel) (cb) [Entry date 07/26/94]
7/26/94	8	ORDER (Judge Michael J. Davis / 7/25/94) adopting report & recommendation [3-1] Case reassigned to Chief Judge Diana E. Murphy (cc: all counsel) (cb) [Edit date 06/21/95]
8/12/94	9	REPLY by pltf to motion to dismiss [4-1] & for summary judgment [4-2]. (cb) [Entry date 08/15/94] [Edit date 06/21/95]
10/13/94	10	NOTICE (Clerk Francis E Dosal / 10/13/94) Case reassigned to Judge David S Doty (cc: all counsel) (1 pg) (sa) [Entry date 10/17/94]
3/14/95	11	REPORT AND RECOMMENDATION (to Judge David S Doty) (Magistrate Judge Raymond L. Erickson /3/14/95) that the petition for a writ of habeas corpus be dismissed. (cc: all counsel) (11 pgs) (sa) [Entry date 03/15/95]
3/27/95	12	OBJECTIONS by pltf to Report and Recommendation [11] (7 pgs) (sc)
4/3/95	13	RESPONSE by defendant to report & recommendation objection [12-1] (1 pg + exh) (cb) [Entry date 04/05/95)
5/22/95	14	ORDER (Judge David S Doty /5/18/95) adopting report & recommendation [11]; granting deft's motion to dismiss & granting motion for summary judgment [4]; that the petition for a writ of habeas corpus is dismissed. (cc: all counsel) (1 pg) (sa)

5/22/95	15	JUDGMENT (1 pg) (sa)
6/20/95	16	NOTICE OF APPEAL by pltf from Judge David S. Doty's order & judgment dated 5/22/95. [14-2] [15-1] (2pgs) (cf) [Entry date 06/21/95]
6/21/95 –		DELIVERED TWO CERTIFIED and one uncertified copy of each of the following to the Court of Appeals, St. Paul Office: Notice of Appeal, Order, Judgment, Report & Recommendation and District Court Clerk's Docket Entries. Copy of Notice of Appeal mailed to counsel (cf) [Edit date 06/21/95]
7/3/95 –		NOTIFICATION BY CIRCUIT COURT of Appellate Docket Number 95-2687MND (cb) [Entry date 07/06/95]
3/12/96	17	COPY OF ORDER OF USCA (Dated 3/8/96) appointing Lomax Marshall Smith of St. Paul, MN to represent the appellant on appeal under the CJA (1 pg) (cn) [Entry date 03/15/96]
1/6/97	18	CERTIFIED COPY OF OPINION FROM USCA (Bowman) (Beam) (Loken) – J; filed 10/3/96 affirming the decision of the District Court [16-1] (8pgs) (cc: All Counsel) (cn)
1/6/97	19	CERTIFIED COPY of judgment from USCA MANDATE ISSUED 1/2/97 (Notice to Counsel) (1pg) (cn)
4/23/97	20	COPY OF LETTER from the Supreme Court stating certiorari has been filed (2pgs) (cn)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION
Criminal No. 4-90-57

UNITED STATES OF AMERICA, Plaintiff, v. KENNETH EUGENE BOUSLEY, Defendant.	SUPERSEDING INDICTMENT 21 U.S.C. §841(a) (1) 18 U.S.C. §924(c) (Filed May 23, 1990)

THE UNITED STATES GRAND JURY CHARGES THAT:

COUNT I

On or about March 19, 1990, in the State and District of Minnesota, the defendant,

KENNETH EUGENE BOUSLEY,

knowingly and intentionally possessed with the intent to distribute approximately seven pounds of meth-amphetamine, a controlled drug substance in violation of Title 21, United States Code, Section 841 (a) (1).

COUNT II

On or about March 19, 1990, in the State and District of Minnesota, the defendant,

KENNETH EUGENE BOUSLEY,

knowingly and intentionally used the following firearms during and in relation to a drug trafficking crime; namely,

the crime of possession of methamphetamine with the intent to distribute it which is a felony that may be prosecuted in a court of the United States:

A loaded Walther PBK .38 caliber handgun, serial no. A016494;

A loaded .22 caliber Advantage Arms 4-shot revolver;

A loaded .22 caliber North American Arms handgun, serial no. C7854;

A loaded .45 caliber Colt Model 1911 semi-automatic handgun, serial no. 244682;

An unloaded Ruger .357 caliber revolver, serial no. 151-36099;

all in violation of Title 18, United States Code, Section 924(c).

A TRUE BILL

/s/ Jerome G. Arnold
UNITED STATES ATTORNEY

/s/ illegible
FOREPERSON

(Exhibit A)
UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION
Criminal No. 40-90-57

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	PLEA AGREEMENT AND SENTENCING STIPULATIONS
v.	)	
KENNETH EUGENE BOUSLEY,	)	
Defendant.	)	

The United States, by its attorneys, Jerome G. Arnold, United States Attorney for the District of Minnesota, and Jeffrey Paulsen, Assistant United States Attorney, and the defendant Kenneth Eugene Bousley, and his attorney Mark Peterson, Esq., hereby agree to dispose of this case on the following conditions:

FACTUAL BASIS

1. The government and the defendant agree that on or about March 19, 1990, in the State and District of Minnesota, the defendant, Kenneth Eugene Bousley, knowingly and intentionally possessed with the intent to distribute methamphetamine. This offense took place at the defendant's residence at 5239 Humbolt Avenue North, Minneapolis, Minnesota. During the execution of a search warrant, law enforcement officers seized a total of approximately seven pounds of methamphetamine from the following locations: 3,153 grams from two briefcases

in the garage; 33 grams from a coffee can in the garage; 6.9 grams from the bedroom in the house. (*See* attached laboratory report). The government's position is that the defendant knew of and is accountable for the entire quantity of methamphetamine found. The defendant contends that he knew of the existence only of the methamphetamine found in the coffee can (33 grams) and in the bedroom (6.9 grams). The conduct described in this paragraph constituted a violation of Title 21, United States Code, Section 841 (a) (1).

2. The parties also agree that, on or about March 19, 1990, in the State and District of Minnesota, the defendant knowingly used firearms during and in relation to a drug-trafficking offense, namely the offense of possession with the intent to distribute methamphetamine. The following firearms were found in the defendant's bedroom near the 6.9 grams of methamphetamine: a loaded Walther PBK .380 caliber handgun, serial number A016494; and a loaded .22 caliber Advantage Arms 4-shot revolver. The defendant admits ownership and possession of these two guns. This conduct constituted a violation of Title 18, United States Code, Section 924(c). Three other firearms were found in the two briefcases containing the bulk of the methamphetamine: a loaded .22 caliber North American Arms handgun, serial number C7854; a loaded .45 caliber Colt Model 1911 semiautomatic handgun, serial number 244682; an unloaded Ruger .357 caliber revolver, serial number 151-36099. The defendant denies knowledge of these three guns.

PLEA AGREEMENT

3. The defendant will plead guilty to Counts I and II of the Superseding Indictment. Count I charges the defendant with possession with the intent to distribute approximately seven pounds of methamphetamine in violation of 21 U.S.C. §841(a) (1). That charge carries a statutory penalty of a minimum of ten years imprisonment up to a maximum of life imprisonment, a fine of up to four million dollars, or both, a supervised release term of five years, a mandatory special assessment of $50, and the assessment to the defendant of the costs of prosecution, imprisonment, and supervision. Count II charges the defendant with using a firearm during and in relation to a drug-trafficking offense. That charge carries a mandatory statutory penalty of five years imprisonment, which must be served consecutively to any other sentence imposed, and a special assessment of $50.

4. There is no limit on the term of imprisonment that the Court may impose and the defendant agrees to be sentenced in accordance with the applicable Sentencing Guidelines. The defendant understands that a mandatory minimum penalty of ten years applies to the drug offense in the event the Court finds that the relevant conduct exceeds 100 grams of methamphetamine. 21 U.S.C. §841(b) (1) (A) (viii). He further understands that a mandatory five-year consecutive sentence applies to the gun offense. There also is no agreement as to fine, supervised release, or costs. The defendant agrees to pay the $50 special assessment.

5. Despite the fact that Count I carries a mandatory minimum penalty of ten years, the defendant is free to

argue that the mandatory minimum does not apply because he did not knowingly possess more than 100 grams of methamphetamine with intent to distribute.

GUIDELINE FACTORS

6. The defendant understands that he will be sentenced in accordance with the applicable Sentencing Guidelines under the Sentencing Reform Act of 1984. The proper application of those guidelines is a matter solely within the discretion of the Court. The parties have, however, agreed upon the following position of the parties with respect to sentencing factors.

7. *Count 1.*

(a) *Base Offense Level.* According to the laboratory report (copy attached hereto) a total of 3,192.9 grams (3.19 kilograms) of a mixture containing methamphetamine was recovered from the defendant's residence. Although some of the packages seized contained a mixture of methamphetamine and amphetamine (as well as adulterant), the Sentencing Guidelines require the entire quantity to be treated as if it were methamphetamine. U.S.S.G. at page 2.45 n.*. 3.19 kilograms of methamphetamine corresponds to a base offense level of 34.

Despite the foregoing, the defendant is free to argue that his base offense level should be decreased, and that the ten-year mandatory minimum does not apply, because he did not knowingly possess all of the methamphetamine seized at his residence. The government, on the other hand, contends that the relevant conduct far

exceeds the 100-gram threshold. The parties agree to allow the court to resolve this dispute, which is a sentencing factor only, not an element of the offense. *E.g., United States v. Padilla,* 869 F.2d 372, 381 (8th Cir. 1989).

(b) *Specific Offense Characteristics.* The specific offense characteristic of using a firearm does not apply to Count I because the defendant is pleading guilty to a separate offense under 18 U.S.C. §924(c). Increasing the base offense level by two levels for use of a firearm would therefore represent double counting.

(c) *Adjustments.* The parties agree that none of the adjustments set forth in Guideline Sections 3A1.1 through 3C1.1 is applicable in this case.

(d) *Acceptance of Responsibility.* The Court will decide whether the defendant is entitled to a two-point reduction for acceptance of responsibility.

(e) *Criminal History Category.* The parties believe the defendant's criminal history category is I based on no known convictions. If the defendant's criminal history category as finally computed is greater than Category I, the defendant may not withdraw his plea based upon that ground and agrees to be sentenced in accordance with the applicable Sentencing Guidelines.

(f) *Guideline Range.* Assuming an offense level of 34 and a criminal history category of I, the guideline range is 151-188 months imprisonment without parole. Assuming an offense level of 32 and a criminal history category of I, the guideline range is 121 to 151 months imprisonment without parole. A ten-year mandatory minimum period of imprisonment applies in this case.

(g) *Fine Range*. Assuming an offense level of 32 or 34, the fine range is $17,500 to $4,000,000.

(h) *Supervised Release*. Both the statute and the guidelines require a term of supervised release of at least five years. 21 U.S.C. §841(b) (1) (A); Guideline Section 5D1.2(a).

8. *Count II*. Count II carries a mandatory five-year consecutive period of imprisonment. 18 U.S.C. §924(c).

9. The above-stated position in the parties with respect to sentencing factors is not binding upon the Court. If the factors are determined by the Court to differ from those stated above, the defendant shall not be entitled to withdraw from the plea agreement.

The foregoing accurately sets forth the full extent of the plea agreement and the sentencing stipulations in the above-captioned case.

Dated: 6/14/90

JEROME G. ARNOLD
United States Attorney

/s/ Jeffrey S. Paulsen
BY: Jeffrey S. Paulsen
Assistant United States Attorney
Attorney ID No. 144332

Dated:

KENNETH EUGENE BOUSLEY
Defendant

Dated:

MARK PETERSON
Attorney for Defendant

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

United States of America, Plaintiff, -vs- Kenneth Eugene Bousley, Defendant.	4-90 Crim. 57 Minneapolis, Minnesota June 15, 1990 9:00 o'clock a.m.

TRANSCRIPT OF PROCEEDINGS
(Change of Plea)

BEFORE THE HONORABLE DIANA E. MURPHY,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:
Jeffrey E. Paulsen,
Assistant U. S. Attorney

For the Defendant:
Mark W. Peterson

Court Reporter:
Edith M. Ritto
552 U.S. Courthouse
Minneapolis, Minnesota

[p. 2] PROCEEDINGS

THE CLERK: Your Honor, the first matter on the calendar is United States versus Bousley.

MR. PAULSEN: Jeff Paulsen on behalf of the Government, Your Honor.

MR. PETERSON: Mark Peterson appearing with Mr. Bousley, Your Honor.

THE COURT: Good morning. I understand that you have an agreement in this case. I have a copy of a plea agreement and sentencing stipulations. My copy doesn't indicate that it's been executed, though.

MR. PAULSON: It has been now, Your Honor, and I would tender the executed copy to the Court.

THE COURT: Okay. Mr. Paulsen, do you want to state the main points of the agreement? Obviously, it's very detailed, and I don't expect you to go over all of it.

MR. PAULSEN: The main points, Your Honor, are that the defendant is going to plead guilty to both Counts I and II of the superseding indictment.

Count I charges that he possessed methamphetamine with the intent to distribute it. The actual amount of methamphetamine involved is left for the Court to decide as a sentencing factor.

The Government takes the position that the relevant conduct includes the entire seven pounds of methamphetamine [p. 3] that was found during the search. And Mr. Peterson would like to argue for a lower amount. He reserves his right to do so.

The defendant is aware that if the relevant conduct exceeds 100 grams, then there's a mandatory ten-year minimum penalty on Count I.

With respect to Count II – that's the gun charge under 924(c) – the defendant is going to plead guilty to that. There's no agreement whatsoever on the penalty there. That carries a mandatory five-year consecutive penalty.

Basically, that's the gist of the agreement. Is that the way you understand it, Mr. Peterson?

MR. PETERSON: Yes, it is.

MR. PAULSEN: And Mr. Bousley?

DEFENDANT BOUSLEY: Yes.

THE COURT: Now, Mr. Paulsen, as I understand the agreement, Mr. Bousley is not going to deny the elements of the offense – in other words, a knowing and intentional possession – but, rather he's going to be free to argue that he didn't know it was the amount that the Government alleges. Is that a fair statement?

MR. PAULSEN: Yes. I understand that methamphetamine was found in three different locations in the house and the garage, and he's going to admit to two of the locations. And I don't believe today he's going to admit to one of the other locations where the bulk of the drugs was [p. 4] found.

The Government is taking the position it is. Because of previous statements Mr. Bousley made, we think that as a sentencing factor, we'll be able to convince the Court that he is accountable for all seven pounds.

THE COURT: And do counsel anticipate that this determination that the Court would make under the agreement would be made upon stipulated facts or that there would be an evidentiary hearing? Or haven't you discussed that?

MR. PAULSEN: We haven't discussed that formally, Your Honor. I propose, of course, to submit all the reports and records I have to the Probation Office, which I imagine will make a recommendation in the first instance.

And at that point, depending on which way that comes out, one or the other of us, I imagine, will be filing some objections. And it may be necessary to have an evidentiary hearing at the time of sentencing.

MR. PETERSON: I would agree with that. I think it really depends on what the presentence report comes up with.

THE COURT: Okay. I would say this, that if Mr. Bousley does plead guilty today, that you notify the Court in advance of the sentencing hearing whether you are going to require an evidentiary hearing and, if so, how many witnesses and how long it would be, for purposes of scheduling. Obviously, if there are going to be witnesses, it's going to [p.5] take more than the normal time that we would schedule.

MR. PAULSEN: We'll do that.

THE COURT: Okay, Fine. Well, Mr. Bousley, I'm going to ask that you take an oath, and if you were to make any false statement after taking an oath, you could

be prosecuted for an additional offense – that is, the offense of perjury. Do you understand that?

DEFENDANT BOUSLEY: Yes, Your Honor.

KENNETH EUGENE BOUSLEY, being first duly sworn, testified as follows:

THE COURT: Mr. Bousley, how old are you?

DEFENDANT BOUSLEY: Thirty-eight.

THE COURT: And what kind of education have you had?

DEFENDANT BOUSLEY: Eleventh grade.

THE COURT: Have you taken any kind of medication today?

DEFENDANT BOUSLEY: No.

THE COURT: I notice that you're using a cane today. Is that something that you do all the time, or have you had a particular injury?

DEFENDANT BOUSLEY: Artificial leg.

THE COURT: Would that condition in any way affect your ability to make a voluntary decision or to understand what's being said in court?

DEFENDANT BOUSLEY: No. [p. 6]

THE COURT: Have you taken any drugs or alcoholic beverages today?

DEFENDANT BOUSLEY: No.

THE COURT: Now, did you listen while Mr. Paulsen outlined some of the features of the plea agreement?

DEFENDANT BOUSLEY: Yes, I did.

THE COURT: Do you disagree with anything that he said about it?

DEFENDANT BOUSLEY: No.

THE COURT: And do you understand that if you plead guilty according to this agreement, you would be facing a possible 15-year sentence?

MR. PAULSEN: Mandatory minimum.

THE COURT: Yes. Do you understand that?

DEFENDANT BOUSLEY: Ten years plus the gun charge?

THE COURT: Right, which would have to be consecutive.

DEFENDANT BOUSLEY: Yes.

THE COURT: And has Mr. Peterson talked with you, gone over with you, all the details of this written plea agreement?

DEFENDANT BOUSLEY: Yes.

THE COURT: Has he discussed with you the pluses and minuses from your point of view?

DEFENDANT BOUSLEY: Yes.

[p. 7] THE COURT: And has he discussed with you the sentencing guidelines and how they could apply to your case?

DEFENDANT BOUSLEY: Yes, he has.

THE COURT: And under this agreement, you're leaving it up to the Court to determine what the amount of the drugs that should be credited to you would be. Do you understand that?

DEFENDANT BOUSLEY: Yes, I do.

THE COURT: And you wouldn't be able to withdraw your plea agreement if the Court's decision goes against your version. Do you understand that?

DEFENDANT BOUSLEY: Yes.

THE COURT: And has Mr. Peterson talked with you about the charges in the superseding indictment and the possible defenses you could raise if you were to go to trial?

DEFENDANT BOUSLEY: Yes.

THE COURT: Has he talked with you about the rights that you'd be giving up if you were to plead guilty?

DEFENDANT BOUSLEY: Yes, he has.

THE COURT: Are you satisfied with the job that he's done for you?

DEFENDANT BOUSLEY: Yes.

THE COURT: Has anybody threatened you in any way to get you to plead guilty?

DEFENDANT BOUSLEY: No.

[p. 8] THE COURT: Has anybody made you any promise that's not incorporated in this written plea agreement?

DEFENDANT BUOSLEY [sic]: No.

THE COURT: Now, the rules do require that I go over the rights that you'd be giving up, because they are very important rights. You have the right, of course, to be represented by an attorney, and you have the right to a jury trial, which encompasses many other rights.

You and your lawyer would be able to participate in the selection of a fair and impartial jury of twelve people, and the jury would be informed about the law that applies in your case. They'd be told a number of times that you're presumed to be innocent of these charges, that the burden of proof is entirely on the Government, and that the burden of proof at trial for the Government is proof beyond a reasonable doubt.

Now, the burden of proof on the sentencing factors is much less, and the law would indicate in our Circuit that it's probably a preponderance of the evidence, which is a much lower standard. Do you understand that?

DEFENDANT BOUSLEY: Yes.

THE COURT: So that the burden of proof that the Government would have in any sentencing determination would be much less than if you were to go to trial and the jury were to be determining your guilt. Do you understand that?

[p. 9] DEFENDANT BOUSLEY: Yes.

THE COURT: And do you understand that any verdict of the jury would have to be unanimous? In other words, for you to be convicted, all twelve jurors would

have to be persuaded by the Government beyond a reasonable doubt that you were guilty. Do you understand that?

DEFENDANT BOUSLEY: Yes, I do.

THE COURT: You'd have the right to cross-examine or question any witness the Government brought against you at trial. You wouldn't have any obligation to put on any evidence because of the burden of proof being on the Government. If you wanted to call witnesses, you could use the Court's subpoena power.

You could testify just like any other witness. If you chose not to testify at trial, however, no one could mention that in front of the jury. And no one could force you to take the witness stand against your will.

If you were to be convicted at trial, you'd be able to appeal that conviction to the Court of Appeals. You'd be able to appeal any adverse ruling that the Court had made against you.

But if you plead guilty, you'd be giving up your normal rights of appeal. Do you understand that?

DEFENDANT BOUSLEY: I could appeal the sentence?

THE COURT: You wouldn't be able to appeal your [p. 10] conviction – do you understand that? – the liability phase. In other words, you wouldn't be able to appeal whether or not you're guilty.

DEFENDANT BOUSLEY: Yes, I understand that.

THE COURT: And also by this agreement – under the sentencing guidelines, there is a right to appeal from a sentence. You understand that?

DEFENDANT BOUSLEY: Yes.

THE COURT: But under the plea agreement, you'd be giving up some of the rights that you would have as far as that goes, too. Do you understand that?

DEFENDANT BOUSLEY: Yes.

THE COURT: Now, do you understand, if you plead guilty, there would be no trial, and you'd be giving up all those rights?

DEFENDANT BOUSLEY: Yes, I do.

THE COURT: Okay. Now, I'm not going to go into all the factors that the Court would look at in considering how the guidelines would implicate on your sentencing, but we've referred to the statutory provisions that come into play in your case and the one determination that the Court would be making about the amount of the substance.

But the Court would also be looking at other factors, and it would only be after the Court gets this presentence report that the Court would be able to determine [p. 11] and calculate these various factors.

The Court would be looking at any prior criminal activity, whether you had been truthful, apparently, in talking with the Probation Office, all other circumstances. Do you understand that?

DEFENDANT BOUSLEY: Yes, I do.

THE COURT: Now, do you understand what it is that you're charged with in the indictment?

DEFENDANT BOUSLEY: Yes, I do.

THE COURT: Okay. Count I – can you tell me what you're charged with in Count I?

DEFENDANT BOUSLEY: Possession with intent.

THE COURT: Possession of what with intent?

DEFENDANT BOUSLEY: Methamphetamine.

THE COURT: Okay. And you're charged with the intent to distribute that amount, is that correct?

DEFENDANT BOUSLEY: Yes.

THE COURT: Now, that count refers to a time of on or about March 19, 1990. Where were you on or about that day, and what were you doing insofar as it relates to this charge?

DEFENDANT BOUSLEY: I was at home, taking care of my daughter.

THE COURT: And where is your home?

DEFENDANT BOUSLEY: 5239 Humboldt Avenue North, Minneapolis.

[p. 12] THE COURT: All right. And did you have in your possession at your house some methamphetamine?

DEFENDANT BOUSLEY: Yes.

THE COURT: And were you at that time – what were you planning to do with that methamphetamine that you had in your house?

DEFENDANT BOUSLEY: The meth that I had I was planning on selling.

THE COURT: Would you expand upon that a little bit?

DEFENDANT BOUSLEY: I had an ounce and a quarter in the garage in a coffee can, and then I had about six ounces in the house.

MR. PETERSON: Six ounces or grams?

DEFENDANT BOUSLEY: Or grams.

THE COURT: And what were you planning to do with that?

DEFENDANT BOUSLEY: Well, the six that were in the house, that was mine; I was going to use for myself. And the ounce and a quarter that was in the coffee can was for sale, that I was going to sell.

THE COURT: And did you know that this was against the law?

DEFENDANT BOUSLEY: Yes.

THE COURT: And do you believe that if you were to go to trial, the Government would be able to prove that that [p. 13] substance was, in fact, methamphetamine?

DEFENDANT BOUSLEY: Yes.

THE COURT: I say again, do you know that after the Court will certainly listen to everything offered

by both sides and my decision as far as how much should be attributed to you could go in your favor, it could also go in the Government's favor. Do you understand that?

DEFENDANT BOUSLEY: Yes, I do.

THE COURT: And Count II – do you know what you were charged with in that count? Can you tell me?

DEFENDANT BOUSLEY: Possession of a firearm.

THE COURT: Okay. Now, it also charges you with possessing the firearms during, in, and in relation to a drug trafficking crime, the type of crime that was referred to in Count I. Would you tell me what kind of weapons you had at the time in question?

DEFENDANT BOUSLEY: There was a .22 four-shot derringer and a PBK 380 automatic pistol.

THE COURT: I think there are five weapons that are charged in the indictment. Is that correct?

MR. PAULSEN: Maybe we can break that down a little bit.

THE COURT: Go ahead, Mr. Paulsen.

[p. 14] (The following questions asked by Mr. Paulsen and answers given by Defendant Bousley.)

BY MR. PAULSEN:

Q. Now, with respect to these two guns you just mentioned, the 380 and the .22, those were found in your bedroom, is that right?

A. Yes.

Q. And that was near that 6.9 grams of methamphetamine that you talked about before, right?

A. Yes.

Q. You don't contest that the police also found about seven pounds of methamphetamine out in your garage in some briefcases, correct?

A. That's what they told me, yes.

Q. All right. And you don't really contest that that was found, do you, by the police during the search warrant?

A. Well, I never seen it, but that's what my understanding is, that they found seven pounds and three other guns in the garage, yes.

MR. PAULSEN: Mr. Peterson, do you have any dispute with that?

MR. PETERSON: I have no dispute with that.

BY. MR. PAULSEN:

Q. And in those briefcases, along with the seven pounds of methamphetamine, were three other guns, correct?

[p. 15] A. Yes.

Q. All right. Now, had you been doing some of the selling of the methamphetamine out of your house as opposed to out of your garage?

A. No.

Q. These guns that were found in your bedroom, how were those connected with the drug trafficking? Were those available for you to use in case something went wrong in drug trafficking?

A. No. They were there for protection –

MR. PETERSON: First of all, there's no dispute that the guns were yours, is that correct?

DEFENDANT BOUSLEY: Right.

MR. PETERSON: And, in the past, you had sold drugs from the area of your residence, is that correct?

DEFENDANT BOUSLEY: In the garage, yes.

MR. PETERSON: And if you had needed a firearm during the selling of any of the drugs in the past, the firearms in the bedroom were available to you, is that correct?

DEFENDANT BOUSLEY: They were available, yes.

MR. PAULSEN: Are you satisfied, Mr. Peterson, that there's a factual basis?

MR. PETERSON: I'm satisfied under the state of the law in this Circuit that there is a factual basis for Count [p. 16] II.

BY MR. PAULSEN:

Q. Those guns were loaded, by the way, when they were found in your bedroom, correct?

A. The .22 four-shot was.

Q. And that was found in the headboard of the bed?

A. Yes, in a tape box.

Q. So it was pretty easily accessible if you needed to get to it in a hurry?

A. Well, it was under other boxes, other video cassette boxes, and inside a video cassette box.

THE COURT: Do you understand, Mr. Bousley, if you wanted to contest whether you were guilty to Count II or not, whether those firearms were related to your drug trafficking, if you wanted to contest that, you'd have to go to trial to do that, do you understand, but that you can do that? Do you understand that?

DEFENDANT BOUSLEY: Yes, Your Honor. But I was just saying – what I meant is, they weren't right out in the open. You know, I couldn't just reach over and grab it.

THE COURT: All right. But I just want you to understand that if you want to contest whether they are related to your drug trafficking, you'd have to go to trial to do that. Do you understand?

DEFENDANT BOUSLEY: Yes.

[p. 17] THE COURT: Okay. Anything else you want to bring out, Mr. Paulsen?

BY MR. PAULSEN:

Q. The search warrant talked about some sales that were made within the previous 72 hours at that location of methamphetamine. You don't dispute, do you, that

you had been making sales from that location within the previous 72 hours?

A. No.

Q. Do you understand that although there's a mandatory 15-year minimum penalty if you're found to be involved with more than 100 grams, the maximum penalty under the statute would be life imprisonment and a $4 million fine? Do you understand that, under the statute?

A. Yes.

MR. PAULSEN: Nothing further.

THE COURT: And that within the maximum that would apply, the Court would be able to determine what the appropriate sentence was. Do you understand that?

DEFENDANT BOUSLEY: Yes.

THE COURT: Mr. Peterson, is there anything you wanted to bring out at this time?

MR. PETERSON: I have nothing further.

THE COURT: Okay. Mr. Bousley, how do you plead to Count I, guilty or not guilty?

DEFENDANT BOUSLEY: Guilty.

[p. 18] THE COURT: And how do you plead to Count II, guilty or not guilty?

DEFENDANT BOUSLEY: Guilty.

THE COURT: Okay. Mr. Bousley, I find that you're competent to enter these pleas, that they've been

voluntarily entered, and that there is a factual basis for them. And I'll ask Mr. Ray to see that a presentence report is prepared.

We've already referred to that in a way that makes it clear that that's a very important document for you, and you should be sure that you read it. Your lawyer and the Government's attorney will meet with the Probation Officer to see if they can resolve any factual disputes. But if they aren't resolved at that point, then you should be sure that we get written notice of that.

And, as I say, if you believe that there's a need for a more extended hearing, we need to have more specifics about how long that would be and what would be involved ahead of time.

All right. We'll see you, then, at your sentencing hearing.

Certified: /s/ Edith M. Kitts
Official Court Reporter

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA
v. Docket No. CR 4-90-57
KENNETH EUGENE BOUSLEY Defendant No. 01

PRESENTENCE REPORT

Prepared For:	The Honorable Diana E. Murphy U.S. District Court Judge
Prepared By:	Julie M. Belt U.S. Probation Officer (612) 348-1980 426 U.S. Courthouse 110 South Fourth Street Minneapolis, MN 55401-2295
Plea/Verdict:	6-15-90: Pled guilty to Counts I and II of the Indictment.
Offense:	Count I: Possession With Intent to Distribute Methamphetamine, 21 USC 841(a)(1). Count II: Use of Firearms During and in Relation to a Drug Trafficking Crime, 18 USC 924(c).
Statutory Penalty:	Count I: Mandatory minimum 10 years to life imprisonment, $4,000,000 fine, at least 5 years supervised release, $50 special assessment.

Count II: Mandatory 5 years imprisonment to be served consecutive to any other sentence imposed. $50 special assessment fee required.

Mandatory Minimum: x Yes ___ No

Plea Agreement: Defendant pled guilty to Counts I and II of the Indictment. Count I carries a mandatory minimum statutory penalty of 10 years imprisonment. Count II requires a 5 year sentence of imprisonment to be served consecutive to any other sentence imposed. There is no limit on the term of imprisonment that the Court may impose. Defendant understands that the mandatory minimum penalty of ten years applies to the drug offense in the event the Court finds that the relevant conduct exceeds 100 grams of methamphetamine. There is no agreement as to the fine, supervised release, or costs. A fifty dollar ($50) special assessment is required per count ($100 total).

Arrest Date and Custodial Status: 03-19-90
05-10-90: Defendant released on $100,000 cash surety bond with home detention via electronic monitoring.

Detainers: None.

Codefendants: None.

Assistant U.S. Attorney:
Jeffrey Paulsen
234 U.S. Courthouse
110 South Forth Street
Minneapolis, MN 55401
(612) 348-1500

Defense Counsel:
Mark W. Peterson
Suite 250
608 2nd Avenue South
Minneapolis, MN 55402
(612) 338-2500

Date Report Prepared: 07-18-90 Date Revised:

Identifying Data:

Birth Date: 10-24-51 Age: 38

Race: White Sex: Male

FBI #: 13062v1 SSN: 469-64-0492

Education Completed: 10th grade

Citizenship: United States

No. of Dependents: Three

U.S. Marshal No.: 04450-041

Other ID No.:

Legal Address: 5239 Humboldt Avenue North
Minneapolis, MN 55444
(612) 529-9045

PART A. THE OFFENSE

Charge(s) and Conviction(s)

1. On May 23, 1990, a Two-count Superceding Indictment was returned by the Federal Grand Jury for the District of Minnesota. The Indictment charged defendant, Kenneth Eugene Bousley, with Count I, Possession With Intent to Distribute Seven Pounds of Methamphetamine, in violation 21 USC 841(a)(1). Count II charged the defendant with Use of Firearms During and in Relation to a Drug Trafficking Crime, in violation of 18 USC 924(c).

2. On June 15, 1990, the defendant pled guilty to Counts I and II of the Indictment. He is currently awaiting sentencing.

3. Since the offense took place after November 1, 1987, the Sentencing Reform Act of 1984 is applicable.

Related Cases

4. None.

The Offense Conduct

5. The following information was obtained from investigative reports completed by the Hennepin-Anoka Suburban Drug Task Force and the Federal Bureau of Investigation Office in Minneapolis, Minnesota.

6. According to a sworn affidavit of Special Agent Kaulfuss, dated March 19, 1990, information was obtained from a confidential informant (CI) regarding the drug trafficking of the defendant, Kenneth Eugene Bousley. The confidential informant indicated that the defendant, who lived at 5239 Humboldt Avenue North, in Minneapolis, Minnesota, sold methamphetamine commonly referred to as "crank". Further information obtained said Bousley typically sold the drug from his garage and that he drove a 1978 Lincoln Continental.

7. Within the past 72 hours, the CI had purchased a quantity of controlled substance from the defendant at his residence which was later field-tested positive for methamphetamine. The confidential informant informed officers that there was more methamphetamine at Bousley's residence.

8. On March 19, 1990, a search warrant was executed at the defendant's residence located at 5239 Humboldt Avenue North, in Minneapolis. Law enforcement officers seized a total of seven pounds methamphetamine from the following locations: 3.153

grams from two briefcases in the garage; 33 grams from a coffee can in the garage; and 6.9 grams from a bedroom in the house. The following firearms were found in the defendant's bedroom near the 6.9 grams of methamphetamine: a loaded Walther PBK.380 caliber handgun; and a loaded .22 caliber Advantage Arms 4-shot revolver. Three other firearms were found in the two briefcases containing the bulk of the methamphetamine: a loaded .22 caliber North American Arms handgun; a loaded .45 caliber Colt Model 1911 semiautomatic handgun; and an unloaded Ruger .357 caliber revolver. Also taken during the search warrant were $4,838.30 in U.S. currency, various ammunition, two scales, packaging material, cutting agent, two police scanners with a listing of scanner frequencies, drug sale records, an air pistol, computer equipment, various identification and documents of the defendant, Kenneth Eugene Bousley, as well as a 1987 Harley Davidson motorcycle. The defendant was present when officers arrived and immediately taken into custody. A fifteen-month-old baby was also present and was subsequently transported to St. Joseph's Hospital.

9. On March 19, 1990, the defendant was interviewed by Special Agents Preston and Jindra. During the interview, Ken Bousley indicated he has been involved in drug trafficking for the past one and one-half years. Defendant admitted that the quantity of methamphetamine seized from the coffee can (33 grams), and the bedroom (6.9 grams), as well as the two firearms belonged to him. Kenneth Bousley denied knowledge of the quantity of drugs and firearms seized from the two briefcases located in the garage. Bousley discussed methamphetamine sales of up to one-half ounce per week and three regular customers. Defendant also stated that $1,300 of the

$4,000 seized came from "crank" sales. Bousley admitted to using an eight-ball of methamphetamine per week to support his personal habit. Finally, Kenneth Bousley admitted that his drug source stores methamphetamine in his garage. He states that he weighs out methamphetamine approximately three-to-four times per month for his drug source in usually four ounce quantities. On the day before his arrest, defendant admitted that he weighed out eight ounces of methamphetamine from a bag that may have contained a pound of methamphetamine. Bousley relates that he is very afraid of his source and feels that he would be killed if he knew that the defendant was talking to the police.

Adjustment for Obstruction of Justice

10. There is no indication that defendant Bousley obstructed justice in reference to the investigation or prosecution of this offense.

Adjustment for Acceptance of Responsibility

11. Immediately following his arrest, defendant Bousley provided authorities with two statements concerning his involvement in the instant offense. In his statements, Mr. Bousley appears to be forthright concerning his drug sales, as well as personal use. It is evident that the defendant is afraid of his source and feels he will be killed should he provide information to authorities.

12. On June 15, 1990, a presentence investigation was initiated by this probation officer. It is noted that defendant Bousley cooperated fully during the presentence interview. In addition, the defendant provided the following written statement in regard to his involvement in the instant offense:

13. "Offense – Possession of methamphetamine with intent to distribute

14. "Explanation For Involvement – I needed money to make ends meet. It was hard for me to find and keep a job because of my back problem and artificial leg.

15. "Offense – Possession of firearms

16. "Explanation For Possession – I had the guns for when I wasn't home so Jessie had protection because she had been raped and we didn't want something like that to happen again because the guy was never caught.

17. "On March 19, 1990 at approximately 3:40 pm I was laying on my bed watching TV and my baby was sleeping in the kid's bedroom. The police came through the kitchen door which was unlocked and told me to face down on the bed. They tie wrapped my hands behind my back, searched me and asked if there were any guns in the house. I told them the 22 4-shot Derringer which was loaded was in the video cassette box in the headboard under 4 or 5 other video cassette boxes and the 380 which was unloaded was in the cabinet next to the bed on the bottom shelf inside a closed zippered vinyl bag along with two loaded clips. They asked about drugs. I told them there were two small bags in the liner of the waterbed. I told them it was about five grams. They told me that they had a search warrant and told me I was under arrest. I think they told me my rights. After I told them about the drugs in the liner, I told them about the 1 1/4 oz. in the coffee can in the garage. They kept asking me where the rest of it was that I had more than that. I told them that was all I had. They asked me for the keys to the garage. I told them they were on my belt. They took the keys, my wallet--they took my belt off and emptied my pockets and them(sic) took me into the living room. They then took me to the Brooklyn Park Police Department."

Offense Level Computation

18. Law enforcement officers seized a total of seven pounds of methamphetamine from the following locations: 3,153 grams from two briefcases in the garage; 33 grams from a coffee can in the garage; and 6.9 grams from a bedroom in the house. The government's position is that the defendant knew of and is accountable for the entire quantity of methamphetamine found. The defendant contends that he knew of the existence only of the methamphetamine found in the coffee can (33 grams) and in the bedroom (6.9 grams). The dispute surrounds the issue of relevant conduct according to Guideline Section 1B1.3.

19. The pertinent rule within 1B1.3 and 1B1.3(a)(1) is as follows:

> ". . . . all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, or that otherwise were in furtherance of that offense;. . . . "

The probation officer's position is that the subject cannot be held accountable for the seven pounds of methamphetamine if the "all acts or omissions, etc." language is used as a basis for that accountability. This subject did not commit or aid and abet in the possession of the seven pounds. This subject cooperated with the FBI in giving information on March 21, 1990. At that time, he claimed the drugs were not his and he was not even aware that the seven pounds of methamphetamine were in his garage. He then went on to give information on his drug dealing activities and information as to where the seven pounds had

probably come from. His statements at the time of his arrest and later statements to this probation officer were consistent and believeable considering all the circumstances of this case.

20. The remaining issue is whether the subject can be held accountable for the seven pounds or some other amount under the "otherwise accountable" language of 1B1.3(a)(1). Application Note No. 1 of 1B1.3 explains the meaning of the term as follows: "In the case of criminal activity undertaken in concert with others, whether or not charged as a conspiracy, the conduct for which the defendant 'would be otherwise accountable' also includes conduct of others in furtherance of the execution of the jointly-undertaken criminal activity that was reasonably foreseeable by the defendant. Because a count may be broadly worded and include the conduct of many participants over a substantial period of time, the scope of the jointly-undertaken criminal activity, and hence relevant conduct, is not necessarily the same for every participant. Where it is established that the conduct was neither within the scope of the defendant's agreement, nor was reasonably foreseeable in connection with the criminal activity, the defendant agreed to jointly undertake, such conduct is not included in establishing the defendant's offense level under this guideline."

21. The defendant has provided a statement to authorities admitting that between July 1988 and November 1989, he purchased methamphetamine from his source on at least twenty occasions in one ounce quantities. Between December 1989 and February 1990, defendant reports that his source made two one-pound deliveries of methamphetamine per month to his garage. The defendant's job was to

weigh out ounce quantities from the pound deliveries of methamphetamine, according to the source's instructions. During this time period, the defendant admitted to weighing out four ounces methamphetamine per pound for his drug source. On March 18, 1990, defendant's source instructed Kenneth Bousley to go to the garage and "double it" meaning weigh out eight ounces of methamphetamine.

22. Based on information provided by the defendant, it is clear that defendant Bousley had knowledge of approximately two pounds of methamphetamine being periodically present in his garage per month during the latter part of 1989 and early part of 1990. It would be reasonably forseeable toIt [sic] would not be reasonably foreseeable to the subject that seven pounds of methamphetamine would be there. It is, therefore, this probation officer's assessment that the quantity of drugs to be used in this case as it pertains to relevant conduct is two pounds or 907.2 grams methamphetamine.

23. Base Offense Level: The guideline section for 21 USC 841(a)(1) offense is 2D1.1. The quantity of drugs in this case is between 700 grams but less than 1 kilogram of methamphetamine; therefore, the base offense level is 30. 30

24. Specific Offense Characteristics: Firearms were possessed during the commission of this offense. However, the defendant was convicted of 18 USC 924(c), and to avoid double counting, no points are added under this specific offense characteristic. 2K2.4, Application Note #2. 0

25. Adjustment for Role in the Offense: None. 0

26. Victim Related Adjustment: None. 0

27. Adjustment for Obstruction of Justice: None. 0

28. Adjustment for Acceptance of Responsibility: -2

29. Total Offense Level. 28

PART B. THE DEFENDANT'S CRIMINAL HISTORY

Juvenile adjudications

30. The defendant was arrested on six occasions between the ages of 14 and 17 for Unauthorized Use of Motor Scooters, Motor Vehicles, and a Boat. Court records indicate the defendant spent time on probation at Glen Lake Home School and the Minnesota Correctional Facility at Lino Lakes, Minnesota. At the age of 17, he was committed to the Youth Conservation Commission and sent to the Minnesota Correctional Facility at Red Wing, Minnesota. He was subsequently discharged in February 1970.

Criminal Convictions

	Date of Arrest	Charge/Agency	Date Sentence Imposed/ Disposition	Guideline/ Score
31.	02-11-79 (Age 27)	Theft Over $2500. Plymouth, MN Police Dept.	3-26-79: Pled guilty to lesser charge of Theft Over $100. 4-26-79: Stay of Imposition of sentence for five years. 5 years probation on condition he participate in chemical dependency programming. Discharged from probation on 4-17-84.	4A1.2(e) 0

Represented by Attorney Jon Erickson. According to a criminal complaint, on February 11, 1979, at 3:45 a.m., police officers observed two pickup trucks in the area of an attempted motorcycle theft reported earlier in the day. Three subjects were observed placing the motorcycle in the rear of one of the trucks. The defendant and John Innes were subsequently arrested. A third codefendant, Donald Elwood, Jr., was arrested at Innes' residence located at 6829 Douglas Drive in Brooklyn Park, Minnesota in possession of the motorcycle. The motorcycle was stolen from the V.I.P. Credit Union who previously had repossessed it. The motorcycle was valued at approximately $2500.

Criminal History Computation

32. The above criminal conviction results in a subtotal criminal history score of zero. 0

33. The defendant was not under any criminal justice sentence at the time the instant offense was cimmitted. NA

34. The instant offense was not committed less than two years after release from imprisonment on a sentence previously counted. NA

35. The total of the criminal history points is zero. According to the Sentencing Table, 0 to 1 criminal history points establishes a criminal history category of I.

Other Criminal Conduct

36. On January 22, 1977, the defendant was arrested by the Minneapolis Police Department and charged with Driving While Intoxicated. The charge was subsequently dismissed.

Pending Charges

37. None.

PART C. SENTENCING OPTIONS

Custody

38. Statutory Provisions: Count I carries a mandatory minimum ten years to life imprisonment. 21 USC 841(b)(1)(A). Count II carries a mandatory minimum five years imprisonment to be served consecutive to any other sentence imposed. 18 USC 924(c)(1).

39. Guideline Provisions: Based on a total offense level of 28 and a criminal history category of I, the guideline imprisonment range for Count I is 78 to 97 months. However, Count I requires a mandatory minimum ten-year sentence of imprisonment; therefore, the guideline imprisonment range is 120 months. In addition, the defendant has been convicted of an 18 USC 924(c)(1) offense; therefore, he is statutorily exposed to an additional sixty-months imprisonment to be served consecutive to any other sentence imposed.

Supervised Release

40. Statutory Provisions: The Court, in imposing a sentence of imprisonment, must impose a term of supervised release of not less than five years or more than life on Count I. 21 USC 841(b)(1)(A). The Court may impose a term of supervised release of not more than three years to follow imprisonment on Count II. 18 USC 3583(b)(2). The terms of supervised release must run concurrently. 18 USC 3624(e).

41. Guideline Provisions: Count I requires a minimum term of five years supervised release by statute. The guideline term, therefore, must be at least five years. 5D3.2(a). The length of the term of supervised release on Count II, a Class D felony, must be at least two years but not more than three years. 5D3.2(b)(2).

Probation

42. Statutory Provisions: The defendant is not eligible for probation as the offenses of conviction expressly prohibit such a sentence. 21 USC 841(b)(1)(A) and 18 USC 924(c)(1).

43. Guideline Provisions: The defendant is not eligible for probation under the guidelines as the offenses of conviction expressly preclude probation. 5B1.1(b)(2).

PART D. OFFENDER CHARACTERISTICS

Family Ties, Family Responsibilities, and Community Ties

44. The defendant, Kenneth Eugene Bousley, was born on October 24, 1951, in Minneapolis, Minnesota. He is one of three children born to the union of Fred and Elaine (nee Stanek) Bousley. The defendant's parents separated shortly after his birth; hence, the defendant reports never establishing a relationship with his father. Defendant indicates that he was basically raised by his grandmother. Ken Bousley states that he shares a close relationship with his mother and two sisters. The defendant is a life-long resident of the Twin Cities area.

45. In 1973, the defendant married Deborah Jacobson in Minneapolis, Minnesota. The couple divorced in 1974.

46. In 1980, the defendant married Paula McMeillien in Minneapolis, Minnesota. Divorce proceedings were initiated in 1982; however, defendant indicates that the divorce was never finalized.

47. For the past three years, defendant has been involved in a relationship with Jessica Sharkey. One child was born from this relationship: Sandra

Bousley, date of birth January 15, 1989. In addition, Jessica Sharkey has one child from a previous marriage: Clay Sharkey, date of birth November 30, 1982. The defendant indicates that his relationship with Ms. Sharkey has become strained recently due to his legal problems.

Mental and Emotional Health

48. Defendant states that he is in stable mental and emotional health and has never sought out the services of a professional in the mental health field. Mr. Bousley indicates that he and Jessica Sharkey discussed the need for family counseling in order to deal with behavioral problems they are encountering with Clay Sharkey. Apparently, the problem centers around lack of parental involvement by Clay Sharkey's natural father.

Physical Condition, Including Drug Dependence and Alcohol Abuse

49. Defendant stands 5'9" tall, weighs 180 pounds, has blue eyes and brown hair. Within the last ten years, the defendant has been involved in at least three motorcycle and car accidents resulting in a partial amputation of his right leg, back injuries, as well as damage to his jaw. Current medical problems include arthritis in the spine, the need for a better fitting leg prothesis, as well as the need for dental work/surgery as the result of his jaw injury.

50. The defendant admits experimenting with cocaine and LSD during the late 1970s. Within the last two years, he admits to snorting methamphetamine with daily use reported at the time of his arrest. The defendant participated in court-ordered chemical dependency treatment as a result of his March 26, 1979 conviction for Theft Over $2500.

Education and Vocational Skills

51. Educational transcripts received from Minnetonka High School indicate that the defendant withdrew from the eleventh grade on November 29, 1967. Records indicate average to below average achievement.

Employment

52. For the last ten years, Ken Bousley reports that he has been self-employed doing repair work on houses. cars, and motor cycles, in addition to auto body work. Average monthly earnings reported are between $400 to $500.

53. Between 1974 and 1979, defendant reports being employed as a truck driver for U.D. Contracting of Minneapolis, Minnesota.

Military

54. In 1970, defendant entered the Marine Corps and served for three months. Mr. Bousley indicates he received a general discharge in 1971 with his highest rank held being Private. (Verification pending.)

PART E. FINES AND RESTITUTION

Statutory Provisions

55. The maximum fine on Count I is $4,000,000. 21 USC 841(b)(1)(A). The maximum fine on Count II is $250,000. 18 USC 3571(b)(3).

56. A special assessment of $50 per count is mandatory ($100 total). 18 USC 3013.

Guideline Provisions

57. The fine range for the instant offense is $15,000 to $4,000,000. 5E4.2(C)(3) and 5E4.2(c)(4)(A).

58. Subject to the defendant's ability to pay, the Court shall impose an additional fine amount that is at least sufficient to pay the costs to the government of any imprisonment, probation, or supervised release ordered. 5E4.2(i). The most recent advisory from the Administrative Office of the U.S. Courts dated April 30, 1990, suggests that a monthly cost of $1,415.56 be used for imprisonment and a monthly cost of $96.66 for supervision.

Defendant's Ability to Pay

59. The following information was obtained by interviewing the defendant. Items marked with an asterisk represent the defendant's half of assets or obligations shared jointly with his girlfriend, Jessica Sharkey.

Assets

Residence*	$ 8,000
1978 Lincoln Mark V*	400
Personal property*	600
Total Assets	$ 9,000

Debts

None	$ -0-
Net Worth	$ 9,000

Monthly Cash Flow

Income - defendant unemployed	$ -0-
Girlfriend's income	850
Total Income	$ 850

Necessary Living Expenses

Home mortgage	$ 336
Electric	55
Heating oil/gas	40

Water/sewer	20
Telephone	24
Groceries, supplies	200
Auto insurance	25
Life insurance	27
Transportation	30
Clothing	20
CD payment	125
Total Necessary Living Expenses	$ 902
Net Monthly Cash Flow	-$ 52

60. Based on the defendant's financial statement and current unemployment, it appears he would be unable to pay a fine.

PART F. FACTORS THAT MAY WARRANT DEPARTURE

61. None.

PART G. IMPACT OF THE PLEA AGREEMENT

62. On June 15, 1990, Kenneth Eugene Bousley entered pleas of guilty to Counts I and II of the Indictment charging him with Possession With Intent to Distribute Methamphetamine in violation of 21 USC 841(a)(1) and Use of Firearms During and in Relation to a Drug Trafficking Crime, 18 USC 924(c). Count I carries a mandatory minimum statutory penalty of ten years imprisonment. Count II requires a mandatory statutory penalty of five years imprisonment to be served consecutive to any other sentence imposed. There is no limit on the term of imprisonment that the Court may impose, and the defendant agrees to be sentenced in accordance with the applicable sentencing guidelines. The defendant

understands that a mandatory minimum penalty of ten years applies to the drug offense in the event that the Court finds that the relevant conduct exceeds one hundred grams of methamphetamine. There is no agreement as to the fine, term of supervised release, or costs. The defendant also agrees to pay the $50 special assessment required per count ($100 total).

63. Under sentencing guideline computations established by this officer, a period of imprisonment of 120 months could be imposed.

Respectfully submitted,

/s/ Julie M. Belt
Julie M. Belt
U.S. Probation Officer

Approved: /s/ Illegible
Glenn Baskfield
Chief U.S. Probation Officer

JMB/np

EXHIBIT B

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

FOURTH DIVISION

United States of America, Plaintiff, -vs- Kenneth Eugene Bousley, Defendant.	4-90 Crim. 57 Minneapolis, Minnesota September 26, 1990 8:30 o'clock a.m.

EVIDENTIARY HEARING

BEFORE THE HONORABLE DIANA E. MURPHY,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:	Jeffrey S. Paulsen, Assistant U. S. Attorney
For the Defendant:	Mark W. Peterson
Court Reporter:	Edith M. Kitto 552 U. S. Courthouse Minneapolis, Minnesota

PROCEEDINGS

[p. 2] MR. PAULSEN: Jeff Paulsen on behalf of the United States. The matter on the calendar is United States versus Kenneth Bousley.

The matter is on for an evidentiary hearing regarding sentencing factors. It's Mr. Peterson's motion. Perhaps I'll defer to him at this point.

THE COURT: Mr. Peterson?

MR. PETERSON: Your Honor, as I'm sure the Court is aware from the various pleadings which have been filed, the issue here this morning is as to the relevant conduct of the defendant, and we are prepared to offer his testimony in that regard.

THE COURT: Okay. And the testimony is going to be about the amount of drugs that should be included in the calculation?

MR. PETERSON: Well, I think the amount that should be included in the calculation is probably a legal issue that this Court is going to have to decide relative to what legally is included in relevant conduct.

The hearing this morning really goes to the factual basis for that determination by the Probation Officer, which is based in part upon statements that the Government claims Mr. Bousley made to interviewing agents and which he says he did not make.

[p. 3] THE COURT: Okay. Just to understand what the parameters of the hearing are going to be, I understand that it relates to the amount of drugs. Is there

one of the firearms that's involved – is there a factual record that needs to be developed on that?

MR. PETERSON: I don't believe so. The firearms which were found in the garage are tied up with the methamphetamine which was found in the garage. Mr. Bousley disclaims any knowledge as to the firearms in the garage, but they are not a separate issue in terms of any sentencing computations that have to be made.

THE COURT: Okay. Go ahead, then.

MR. PETERSON: Call Mr. Bousley.

KENNETH BOUSLEY,

called as a witness by the Defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PETERSON:

Q. Mr. Bousley, would you state your full name and home address for the record, please?

A. Kenneth Eugene Bousley; 5239 Humboldt Avenue North; Minneapolis, Minnesota.

Q. And you are the defendant in this action?

A. Yes.

Q. And you understand that you have pled guilty to two [p. 4] offenses, possession with intent to distribute methamphetamine and possession of a firearm during a drug trafficking crime, is that correct?

A. Yes.

Q. And you're also aware that those guilty pleas relate specifically to charges brought against you as a result of activity taking place on March 19th of this year, is that correct?

A. Yes.

Q. And you also understand that the sentencing issues which are involved in this case involve the history of your being involved in methamphetamine use and purchasing, is that correct?

A. You mean my prior? – I thought it was for March 19th.

Q. Well, that's what you're charged with. But you understand that there's an issue as to whether all conduct which has been made a subject of factual dispute in this case is involved or just your conduct on March 19th?

A. I thought it was just my conduct on March 19th.

Q. Okay. My question is whether you understand that there is an issue as to whether all of your conduct, or only your conduct on March 19th can be considered here. I'm just asking if you understand there's a question about it.

A. I understand it.

Q. When did you first become involved in purchasing [p. 5] methamphetamine?

A. Right around September of '88.

Q. And you continued to purchase methamphetamine up until the time of your arrest on March 19, 1990, is that correct?

A. Yes.

Q. How many sources of methamphetamine did you have during that time?

A. One.

Q. And did you ever make any purchases of methamphetamine from any other source during that time?

A. No.

Q. Approximately how many purchases did you make from 1988 up until March 19th of 1190?

A. Around 30.

Q. And where generally did those purchases take place?

A. In my garage.

Q. Any other place?

A. No.

Q. What size purchases of methamphetamine for yourself did you usually make?

A. For myself, two ounces.

Q. That was the size that you had normally made?

A. Normally? One ounce.

Q. And what's the largest amount of methamphetamine that you ever purchased for yourself?

[p. 6] A. Two ounces.

Q. As I understand the facts involved in this case, your source on various occasions would deliver larger amounts of methamphetamine to your garage that you actually purchased for your own use, is that correct?

A. Yes.

Q. What size did your source usually deliver on those occasions?

A. Just over four ounces.

Q. And approximately on how many occasions were just over four ounces delivered to your garage?

A. Around six times.

Q. And if you usually purchased one ounce, what happened to the other amounts that were delivered by your source?

A. He would pick them up again.

Q. Pardon me?

A. He would pick them up and take them.

Q. When would he normally pick them up?

A. Usually the same day.

Q. What is the largest amount of methamphetamine that your source delivered to your garage?

A. I'm not sure. I believe it was around twelve ounces.

Q. And when did that occur?

A. I weighed that up on the 18th of March.

Q. Of this year?

[p. 7] A. Yes.

Q. And you weighed up twelve ounces?

A. I weighed up eight ounces for my source and one ounce in half-ounce quantities for myself.

Q. I'm sorry. State that again.

A. I weighed up eight ounces for my source and then a one-ounce quantity, but they were in two bags, a half-ounce each.

Q. So that would be a total of nine ounces?

A. Yes.

Q. What happened to the other three ounces?

A. I put that back in the bag with the other eight ounces.

Q. The other eight ounces that were for your source?

A. Right.

Q. And what did you do with the two half-ounces that you had weighed up for yourself?

A. I put them in the coffee can above the workbench.

Q. Coffee can of what workbench?

A. Above the workbench in my garage.

Q. And was that the methamphetamine, or part of the methamphetamine, which was seized by police officers the next day?

A. Yes.

Q. Was the March 18th delivery of approximately twelve ounces the only time that an amount larger than approximately[p. 8] four ounces of methamphetamine was delivered?

A. Yes.

Q. Was there any occasion on which you had more than two ounces for your own use, either for personal use or for sale?

A. If there was, it would be a gram or so, just maybe a gram left over from previous. That was it.

Q. Now, you're aware that two briefcases were seized from your garage as a result of the search on March 19th, and those briefcases contained both a large amount of methamphetamine as well as some firearms, is that correct?

A. Yes.

Q. Were you aware of the presence of either one of those briefcases in your garage on March 19?

A. March 19th, I wasn't sure. I had seen one there before.

Q. Well, I'm talking about March 19th. Were you aware of the presence of either one of the two briefcases on March 19th?

A. No, I wasn't fully aware. I've seen it there before, but I didn't know if it was there on the 19th or not.

Q. You had seen one or both of them there before?

A. One.

Q. And which one had you seen there before?

A. I don't know what the brand is. It's a small, narrow, brown briefcase.

Q. What color was it?

[p. 9] A. Brown.

Q. Any other identifying characteristics?

A. Not really.

Q. And when had you last seen that briefcase in your garage?

A. I think it was September or October.

Q. Of 1989?

A. Of '89.

Q. Besides the methamphetamine which was contained in the coffee can in the garage, were you aware of any other methamphetamine or any other firearms in your garage on March 19th?

A. No.

Q. Now, on March 19th, methamphetamine was found both in the garage and in your bedroom, is that correct?

A. Yes.

Q. Would you tell the Court specifically what methamphetamine, first of all, belonged to you on that date?

A. What I had personally, that weighed out to be 6.9 grams that was in my bedroom. And there was 33 grams in a coffee can above the workbench in the garage.

Q. And all that methamphetamine was yours?

A. Yes.

Q. Were you aware of any other methamphetamine present either in your house or in the garage on March 19th?

A. No.

[p. 10] Q. Some guns were also seized both from the garage and from your bedroom. Will you tell us what guns belonged to you personally that were seized on March 19th?

A. I had a Walther-PPK .380 that was in the bedroom of the house, and I had a .22 four-shot Derringer that was also in the bedroom of the house.

Q. Did you possess any other firearms on that date?

A. No.

Q. Were you aware of any other firearms at your residence or in the garage on that date?

A. No.

Q. Now, subsequent to your arrest, you were interviewed both by police officers from the Brooklyn Park

Police Department as well as agents of the FBI, is that correct?

A. Yes.

Q. Do you recall when those interviews took place and what your location was?

A. I was interviewed in Brooklyn Park the night of the 19th, at Brooklyn Park.

Q. How about by the FBI?

A. Tuesday, the 20th, and Wednesday, the 21st. Tuesday, the 20th, was at Brooklyn Park, and the 21st was at the Federal Building here.

Q. And do you recall who you spoke to when you met with the FBI at the Federal Building?

[p. 11] A. It was Agent Mike Kelly.

Q. And who did you talk to from the Brooklyn Park Police Department?

A. Officer Genrud, I believe his name is.

Q. Gindra?

A. Gindra.

Q. Any other officers that you talked to?

A. There was a Larson that was with Mr. Kelly, and there was a Mr. Preston who was with Gindra.

Q. When you spoke to these law enforcement agents, did you ever tell them that your source had been delivering pounds of methamphetamine to you?

A. No.

Q. Did you, in fact, ever receive pounds of methamphetamine from your source?

A. No.

Q. And what, again, is the largest amount of methamphetamine that was ever present at your garage, at least to your knowledge?

A. I believe it was twelve ounces.

Q. And that was the amount delivered on the 18th of March?

A. On the 18th.

MR. PETERSON: I have no further questions.

THE COURT: Mr. Paulsen?

[p. 12] BY MR. PAULSEN:

Q. Mr. Bousley, so the Court understands, what you were doing with this methamphetamine that your source brought over was weighing it out into distribution quantities for your source, correct?

A. I was weighing it from a four-ounce bag into one-ounce bags.

Q. In other words, your source, Pat Matter, would bring over larger quantities in bulk, and you would weigh them out into one-ounce amounts so they could be distributed, correct?

A. I would weigh out into one-ounce bags, right.

Q. And you knew that Mr. Matter was going to resell this to other people, correct?

A. Probably.

Q. You were helping Mr. Matter to resell this methamphetamine by weighing it up into one-ounce quantities for him, correct?

A. I wasn't helping him. I mean, I wasn't selling it for him, no.

Q. I understand you weren't selling it for him. But he asked you to weigh it up for him in your garage, correct?

A. Yes.

Q. And the reason he wanted you to do that is so that he could have one-ounce bags that were already weighed up that he [p. 13] could sell to other people, correct?

A. What he did with it I don't know.

Q. Well, you didn't have any doubt in your mind he was going to distribute that to other people, did you?

A. Probably, yes.

Q. And that's what you pled guilty to, as a matter of fact, was possession with the intent to distribute methamphetamine?

A. I pled guilty to my distribution of it.

Q. All right. And as a payment for doing this, you would be allowed to keep some of the methamphetamine from the bulk quantities that you weighed up, right?

A. If there was any, you know, small amount left over, like under an ounce, I would keep that. But all the

ounces and stuff that I bought, you know, I paid for that. I was never given an ounce or nothing like that for payment, no.

Q. Now, you're aware that on the day you were arrested, the police found two briefcases in your garage, correct?

A. Yes.

Q. And in one of the briefcases was two pounds of methamphetamine, correct?

A. That's what they said, yes.

Q. And in the other briefcase was five pounds of methamphetamine, correct?

A. That's what I was told, yes.

Q. All right. Let's take for a moment the briefcase [p. 14] containing the two pounds of methamphetamine. I believe you testified that the last time you ever saw that briefcase was in September or October of 1989?

A. Yes, I believe so.

Q. Is it your testimony that you did not know that briefcase was in your garage on the day you were arrested?

A. I didn't look to see if it was there or not, you know. It could have been there, and it could have been gone.

Q. Well, how about the day before you were arrested?

A. I didn't see it then. I didn't look.

Q. I'm going to show you what's been marked for identification as Government's Exhibit 1. Take a look at that and see if you recognize it.

A. Yes.

Q. That's a statement you gave to Detective Gindra and Detective Preston of the Brooklyn Park Police Department on the day you were arrested?

A. Yes.

Q. It's a 21-page statement. At the end of it, you've signed it, saying that "I, the undersigned, have received a copy of this 21-page statement and find it to be true and correct as I have given it." That's your signature on page 21, correct?

A. Yes.

Q. And, in fact, you did read through that statement prior [p. 15] to signing it, and you made some corrections, which are indicated with your initials?

A. Yes.

Q. All right. So it was a true and correct statement that you gave to the officers, correct?

A. Yes.

Q. I'd like you to look at page 13 of the statement, about the middle of the page.

MR. PAULSEN: Your Honor, I have an extra copy for the Court.

(Document handed to the Court.)

BY MR. PAULSEN:

Q. Do you see right underneath where it says "Tape 2, Side 1," there's a question by Detective Preston. And he's telling you about what they found out in the garage, and he says, "All right. There is a couple that look like a pound, but there were five-pound baggies in one of the briefcases. There was a pound baggie, and then there was a sandwich type bag in another briefcase. This is where you took the eight ounces from ?" And your answer was, "Yeah, I used the sandwich bags."

A. Yeah, I took it from a sandwich bag. I didn't take it from the briefcase; I took it from the sandwich bag.

Q. Well, it says here – it goes on to say, "You used the sandwich bag you took it out from , so obviously you knew what was inside the briefcase?" And your answer was, "I knew [p. 16] what – that there was some. I didn't think there was what you said, seven pounds or whatever." Do you remember saying that?

A. I believe I said it, yes.

Q. All right. And then you go on to say that you didn't know anything about the five pounds in the other briefcase. You said, "I didn't know nothing about that, no."

A. I didn't know anything about seven pounds or five pounds or –

Q. Well, it does seem that what you told the police was that the eight ounces that you scaled up the day before you were arrested came from that briefcase containing two pounds of methamphetamine.

A. No. It came from a bag that was underneath the workbench. And that's stated on the top of the page.

Q. Where are you referring me to? There's a question at the top of the page, the second question, "You weighed these ounces from the meth that was in one of the briefcases?"

Answer: "There was a bigger bag in there, yeah."

And then it says, "So you weighed those eight ounces from – what did you do with eight ounces? Did you sell them?" Your answer is "No." And then you go on to say, "I left them underneath the woodbench."

Question: "You left them underneath the woodbench?"

Answer: "He might have put some in that briefcase with, [p. 17] you know."

So you clearly knew about that briefcase the day before you were arrested, didn't you?

A. No, I didn't.

Q. And then you were asked some questions about a statement you gave a few days later to Agent Mike Kelly of the FBI. I'll ask you whether or not you made these statements to Agent Kelly.

The first statement: "During December of 1989, Pat Matter began delivering one-pound quantities of methamphetamine to him, Mr. Bousley, at his residence." Do you recall making that statement?

A. No.

Q. Second statement: "According to Bousley, Pat Matter would instruct him to weigh out ounce quantities from the pound." Do you recall making that statement?

A. No.

Q. Do you recall making the statement, "If Pat Matter were present, he would assist him, Bousley, in weighing out ounce quantities of methamphetamine"?

A. No.

Q. The next statement, "If Matter could not stay, he would leave the pound quantities of methamphetamine in the garage and instruct Bousley on what amounts to weigh out from each pound." Do you recall making that statement?

[p. 18] A. No.

MR. PAULSEN: I have no further questions, Your Honor.

MR. PETERSON: I have nothing further.

THE COURT: Okay. You may step down, Mr. Bousley.

(Witness excused)

MR. PETERSON: We have no further witnesses, Your Honor.

MR. PAULSEN: The Government would call Special Agent Mike Kelly of the FBI.

Before I begin, Your Honor, I'd like to offer Government's Exhibit 1 for the court record.

MR. PETERSON: No objection.

THE COURT: Does that have both of the statements in it that you were asking Mr. Bousley about?

MR. PAULSEN: The only statement that was transcribed is the one given to the Brooklyn Park police.

THE COURT: Exhibit 1 is received.

(Government's Exhibit 1 received in evidence)

[p. 19] MICHAEL KELLY

called as a witness by the Plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PAULSEN:

Q. Special Agent Kelly, how are you employed?

A. I'm employed as a special agent with the Federal Bureau of Investigation, assigned to the Minneapolis Division of the FBI.

Q. And how long have you been so employed?

A. Since December 1st of 1985.

Q. You're the case agent in the matter of the United States of America versus Kenneth Eugene Bousley?

A. I am.

Q. Did you have an occasion to interview Mr. Bousley on March 21, 1990?

A. I did.

Q. So that was two days after his arrest?

A. That's correct.

Q. And did you begin the interview by giving him his Miranda warning, and so forth?

A. I did, yes.

Q. In fact, he signed a written waiver of his Miranda rights, is that correct?

A. He did, as witnessed by Sergeant Larson of the FBI [p. 20] Minneapolis Task Force.

Q. And during this interview, did he appear to be under the influence of any drugs or alcoholic beverages?

A. No, he did not.

Q. Did he respond to your questions appropriately?

A. He did.

Q. Did you have a conversation with Mr. Bousley during this interview concerning deliveries of methamphetamine to Mr. Bousley's residence?

A. Yes.

Q. And what did Mr. Bousley tell you about that?

A. Mr. Bousley gave me an extensive statement during the interview concerning his narcotic activities with one Patrick Joseph Matter, who was known to me.

Q. He's the president of the Hell's Angels, isn't that right?

A. Yes, he's the president of the local chapter of the Hell's Angels motorcycle gang.

Q. And what did Mr. Bousley tell you about his dealings with Pat Matter?

A. Specifically, he told me about his narcotic dealings with Pat Matter from July of 1988 through March, until the time of his arrest, of 1990. He specifically identified Mr. Matter as his source and particularly identified Mr. Matter as an individual who has supplied him with multi-pound quantities of [p. 21] methamphetamine at Mr. Bousley's residence on numerous occasions.

Q. I show you a copy of your report, and see if that refreshes your recollection as to the exact time period Mr. Bousley was talking about with regard to these deliveries of pounds of methamphetamine.

A. Yes. Mr. Bousley advised me that the pounds started in approximately December of 1989 and continued up until the time of his arrest in March of 1990.

Q. Did he indicate how many pounds total were delivered?

A. I'd have to add them up. I don't recall.

THE COURT: December of what year, did you say?

THE WITNESS: December of 1989 through March of 1990.

A. I would say somewhere in the vicinity of approximately seven to ten pounds prior to his arrest.

MR. PAULSEN: I have no further questions.

THE COURT: Mr. Peterson?

CROSS-EXAMINATION

BY MR. PETERSON:

Q. Agent Kelly, did you take notes when you were interviewing Mr. Bousley?

A. I did.

Q. Are they present?

[p. 22] A. No, they're not.

Q. Are they still in existence?

A. They are.

Q. Did you review them prior to testifying here today?

A. No, sir.

Q. Would it take long to get them up here?

A. No, sir, it wouldn't take long.

MR. PETERSON: Your Honor, could we have a brief recess for that purpose?

THE COURT: All right. We'll be in recess for a minute, then.

(Recess taken)

MR. PETERSON: Thank you, Your Honor. Agent Kelly has produced his notes, and I have reviewed them.

BY MR. PETERSON:

Q. Agent Kelly, am I also correct that you've reviewed your notes and reports, and it would be your

testimony that Mr. Bousley told you about a total of six pounds of methamphetamine alleged to have been delivered in December of 1989, January of 1990 and February of 1990?

A. That's correct.

THE COURT: Well, just a minute. I'm not quite sure I understand that question. It's a total of six pounds over the three months?

[p. 23] THE WITNESS: Your Honor, I had previously estimated, as I said in my testimony, that it was approximately seven to eight pounds. Mr. Peterson is correcting me that it was only six pounds, through my report. That is accurate.

THE COURT: Okay, thank you.

THE WITNESS: Yes, Ma'am.

BY MR. PETERSON:

Q. Now, you also spoke to Mr. Bousley about his activities on March 19, 1990, is that correct?

A. Yes.

Q. And he told you that in accordance with instructions from his source, he was to weigh out eight ounces of methamphetamine, correct?

A. That is correct.

Q. And he told you that he did so and placed that eight ounces of methamphetamine in a grocery bag beneath the workbench in the garage?

A. Yes.

Q. And he also told you that he weighed out an ounce of methamphetamine for himself and put that ounce and another ounce in a coffee can in the garage, is that correct?

A. Yes.

Q. He also advised you that he had no knowledge of the seven pounds of methamphetamine which was seized from the two [p. 24] briefcases?

A. That's what he advised me on March 21st, yes, sir.

Q. And he also told you that he had no knowledge of the firearms which were found within the briefcases, is that correct?

A. That's correct.

MR. PETERSON: I have no further questions.

THE COURT: Mr. Paulsen?

REDIRECT EXAMINATION

BY MR. PAULSEN:

Q. Just so the record is clear, when you reviewed your handwritten notes, did you find them to be consistent with your typewritten report?

A. Yes. Thoroughly accurate, yes, sir.

MR. PAULSEN: I have nothing further.

MR. PETERSON: Nothing further.

THE COURT: Thank you, Agent Kelly.

(Witness excused)

MR. PAULSEN: The Government would rest.

THE COURT: Do you have any other testimony, Mr. Peterson?

MR. PETERSON: No, Your Honor.

THE COURT: Okay. Do either counsel want to make an [p. 25] argument based upon the evidence that was produced this morning?

MR. PETERSON: No, Your Honor. I'd submit it on the record.

THE COURT: Mr. Paulsen?

MR. PAULSEN: Just briefly, Your Honor. The government's position, as we set forth in our papers, is that he could fairly be held accountable for all seven pounds. And in support of that, I want to refer the Court to some cases.

I just got the Sentencing Commission's case law update the other day, and there are three cases. Maybe I can give the cites to your clerk after the hearing. But the test is whether the drugs are part of the same common scheme or plan.

THE COURT: Maybe you could just mention the citations without the names so Mr. Peterson hears them, too.

MR. PAULSEN: Sure. 900 F.2d 131 is an Eighth Circuit case; 893 F.2d 947, Eighth Circuit; and then there's a Ninth Circuit case that covers a lot of different circuits, reviewing the law, and that's 903 F.2d 648.

But the test is whether the drugs are part of the same common scheme or plan. They don't even have to be charged in the indictment. You can go beyond the indictment when you figure out the base offense level.

Here, the common scheme or plan was for Mr. Bousley [p. 26] to weigh up ounce quantities for his source, Pat Matter, who would then pick them up after they were packaged into distribution quantities and go sell them. That's the common scheme or plan that was going on from at least December of '89 up until the date of his arrest.

And at various times pounds at a time were delivered to the garage, where they were stored. Apparently they were stored in these briefcases.

Now, Mr. Bousley claims that he didn't know that the five pounds were in one of the briefcases. But two pounds was found in the other briefcase, and I think the record fairly shows, when you read this statement that he admits was truthful in its entirety and in context, it shows that on the day before his arrest, he took methamphetamine out of the one briefcase that was later found to contain two pounds, he weighed it up, put it under the workbench, and then at some point it got back into that briefcase – how, exactly, we don't know.

But he knew about that briefcase. He knew what it contained. And he should be held accountable at least for the two pounds in that briefcase.

That's what the Probation Office is recommending, two-pound accountability. And even though we believe he could be held accountable for the seven pounds, we'll

go along with the Probation Office because of the ten-year mandatory minimum [p. 27] that applies the minute you find that he's involved with more the 100 grams of methamphetamine.

One-hundred grams is the threshold for a ten-year mandatory minimum. Anything above 100 grams, the exact amount is largely irrelevant.

But we would suggest that you adopt the Probation Officer's finding of the two-pound amount. That's all I have.

THE COURT: Did you want to make a reply, Mr. Peterson?

MR. PETERSON: No, Your Honor.

THE COURT: Okay, thank you. I'll go back over the testimony and the record and issue written findings fairly soon, and we'll schedule the sentencing then.

Certified: /s/ Edith M. Kitts
Official Court Reporter

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Crim. 4-90-57

United States of America,
Plaintiff,

v.

Kenneth Eugene Bousley,
Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Jeffrey Paulsen, Esq., Assistant United States Attorney, District of Minnesota, appeared for the government.

Mark W. Peterson, Esq., 608 Second Ave. S., Minneapolis, MN 55402, appeared for defendant.

Defendant Kenneth Eugene Bousley pleaded guilty to an indictment charging him in Count I with Possession With Intent to Distribute Methamphetamine, 21 U.S.C. § 841(a)(1), and in Count II with Use of Firearms During and in Relation to a Drug Trafficking Crime, 18 U.S.C. § 924(c). A Presentence Report was prepared and presented to the parties. Defendant requested an evidentiary hearing regarding disputed facts in the Report. Testifying at this hearing were Kenneth Bousley, defendant, and Special Agent Michael Kelly of the FBI. Also admitted into evidence at this hearing was the signed statement of Kenneth Bousley to Detectives Jindra and Preston of the Brooklyn Park Police Department on the day of his arrest, March 19, 1990.

FINDINGS OF FACT

Based on the evidence produced at the hearing and the court's evaluation of the testimony of the witnesses, the court makes the following findings of fact:

1. Kenneth Bousley received deliveries of methamphetamine from his source in his garage between December, 1989 and March 19, 1990, totalling approximately six pounds.

2. Bousley had seen at least one briefcase in his garage during this period, and knew that it contained methamphetamine. He regularly weighed out small quantities of methamphetamine for his source from the larger deliveries. His source picked up the quantities Bousley had weighed out for distribution. Bousley kept small amounts of stray methamohetamine left over from the weighing and packaging for himself.

3. In his statement to Detectives Jindra and Preston, Bousley stated that he knew about one briefcase in his garage, which was found to contain about two pounds of methamphetamine, and that he weighed out smaller quantities from the methamphetamine stored in this briefcase. In direct testimony before the court, Bousley stated that he was "not fully aware" of the briefcases on the day he was arrested, but he had previously seen one briefcase in his garage which he described as small, narrow and brown. This was the briefcase which was found to contain two pounds of methamphetamine.

4. Bousley testified that his signed statement to Detectives Jindra and Preston was a true and correct statement. Bousley denied certain facts which Special

Agent Kelly testified Bousley had told him two days after arrest, but Bousley's testimony concerning these specific facts was equivocal.

5. Bousley knew there was regularly methamphetamine in at least one of the briefcases in the garage. It was reasonably foreseeable to him that at least one of the briefcases found in his garage at the time of his arrest would contain methamphetamine in quantities of one pound or more.

6. Approximately 907 grams of methamphetamine were in the small, narrow, brown briefcase in Bousley's garage at the time of his arrest, 33 grams were in the coffee can over the workbench in his garage, and 6.9 grams were in a bag in his bedroom. The court finds that all of these 946.9 grams of methamphetamine were part of a common scheme or plan between Bousley and Bousley's source to distribute methamohetamine.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the court makes the following conclusions of law:

1. That as relevant conduct the defendant is accountable for the 946.9 grams of methamphetamine which were found in one of two briefcases in his garage, in a coffee can in his garage, and in his bedroom, at the time of his arrest. *See United States v. Sleet*, 893 F.2d 947 (8th Cir. 1990).

2. The defendant aided and abetted the distribution of methamphetamine by weighing it up for his source on

numerous occasions as part of a common scheme or plan. *See id.*

ORDER

These findings of fact and conclusions of law shall be part of the basis for the court's determination of the defendant's sentence.

Dated: September 28, 1990

/s/ Diana E. Murphy
Diana E. Murphy
United States District Judge

UNITED STATES DISTRICT COURT
_____ District of Minnesota

UNITED STATES OF AMERICA V. Kenneth Eugene Bousley (Name of Defendant)	**JUDGMENT IN A CRIMINAL CASE** (For Offenses Committed On or After November 1, 1987) Case Number: 4-90-57 Mark W. Peterson Defendant's Attorney

THE DEFENDANT:

[X] pleaded guilty to count(s) 1 and 2 .
[ ] was found guilty on count(s) _____ after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 841(a)(1)	Poss. w/intnt to distribute meth-amphetamine.		1
18 924(c)	Use of Firearms during & in rel. to a drug trafficking crime.		2

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____

[ ] Count(s) _____ (is)(are) dismissed on the motion of the United States.

[ ] It is ordered that the defendant shall pay a special assessment of $100., for count(s) 1 & 2, which shall be due [X] immediately [ ] as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 469-64-0492	November 2, 1990 Date of Imposition of Sentence
Defendant's Date of Birth: 10/24/51	/s/ Illegible Signature of Judicial Officer
Defendant's Mailing Address: 5320 Humboldt Ave. No. Minneapolis, MN 55444	Diana E. Murphy, U.S. District Judge Name & Title of Judicial Officer
Defendant's Residence Address: Same as above	November 2, 1990 Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 78 months on count 1. On Count 2, the defendant is hereby committed. to the custody of the Bureau of Prisons to be imprisoned for a term of 60 months, to be served consecutively to the term imposed for count 1.

[X] The court makes the following recommendations to the Bureau of Prisons:

That the Federal Prison Camp in Duluth, MN be designated as the defendant's place of confinement.

[ ] The defendant is remanded to the custody of the United States Marshal.

[X] The defendant shall surrender to the United States Marshal for this district,

[X] at 9:00 a.m./p.m. on Dec. 14, 1990.
[ ] as notified by the Marshal.

[X] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

[X] before 2 p.m. on Dec. 14, 1990.
[ ] as notified by the United States Marshal.
[ ] as notified by the Probation Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 4 years on Ct. 1, and 3 years on Ct. 2. Terms of supervised release to run concurrently.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

[ ] The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

[ ] The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

[X] The defendant shall not possess a firearm or destructive device.

The defendant shall submit to periodic drug testing at least every 60 days and participate in substance abuse programing at the direction of the U.S. probation Office.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment the defendant shall not commit another federal state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

STATEMENT OF REASONS

[ ] The court adopts the factual findings and guideline application in the presentence report.

OR

[X] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary);

See attachment.

Guideline Range Determined by the Court:

Total Offense Level: 28

Criminal History Category: 1

Imprisonment Range: 78 to 97 months on Ct. 1, 60 mos. consec., for ct. 2.

Supervised Release Range: ___ to ___ years 4 years to life.

Fine Range: $12,500. to $2,000,000.

[X] Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $ _____

[ ] Full restitutions not ordered for the following reason(s):

[X] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs form the guideline range

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[ ] for the following reason(s):

MINUTES OF PROCEEDINGS

UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA, FOURTH DIVISION

DATE: 11-2-90 JUDGE: Murphy REPORTER: Kitto

CRIMINAL NUMBER: 4-90-57

UNITED STATES OF AMERCA [sic]

v.

/s/ Kenneth Eguene [sic] Bousley

/s/ Jeffrey Paulsen
Attorney for Government

/s/ Mark W. Peterson
Attorney for Defendant

SENTENCING

() It is adjudged that the defendant is committed to the custody of the Bureau of Prisons for imprisonment for a term of 78 months for count 1. On Ct. 2, deft. is committed to the custody of the Bureau of Prisons for imprisonment for a term of 60 months, to be served consecutively to the sentence imposed for count 1.

It is further adjudged that on ct. 1, deft. is to serve a term of supervised release of 6 yrs. on ct. 2, the deft is to serve a term of supervised release of 3 yrs, to run concurrently with ct. 1, upon the following terms and conditions: 1. That deft. not possess any firearms or dangerous weapons. Taht [sic] deft. submit to periodic drug testing at least every 60 days and participate in substance abuse programing at the direction of the U.S. Probation Office.

() It is further adjudged that pursuant to title 18, United States Code, 3013, defendant is assessed a conviction penalty of $100 to be paid to the United States, due immediately.

() The court finds the defendant is eligible for the voluntary surrender program. Execution of sentence is stayed until 12-14-90 at which time the defendant shall surrender to the United States Marshal in Mpls., MN at 9:00 a.m., or if the Bureau of Prisons has designated an institution to which the defendant shall report, the defendant shall arrive at the institution no later that [sic] 2:00 p.m. on that date.

() The court recommends _____

() Counts _____ dismissed on the motion of the U.S. Attorney.

/s/ Mary Kaye Conery
Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Crim. No. 4-90-57

United States of America,
Plaintiff,

v.

Kenneth Eugene Bousley
Defendant.

SENTENCING MEMORANDUM

I. FINDINGS OF FACT

The court adopts the factual statements contained in the presentence investigation report (PSI) as to which there are no objections. A dispute has arisen with respect to the factual statements contained in paragraphs 8-9, 13-15, and 26-28 of the PSI, concerning the quantity of methamphetamine for which the defendant is accountable. This dispute was the subject of an evidentiary hearing held September 26, 1990. On September 28, 1990, based on this hearing, the court entered findings of fact which are hereby incorporated and attached to this memorandum.

II. APPLICATION OF GUIDELINES TO FACTS:

The court adopts the conclusions as to the applicable guidelines contained in the PSI to which there are no objections. A dispute was raised with respect to the conclusions contained in paragraphs 29, 35 and 45 of the PSI. This dispute is resolved by the

conclusions of law reached on the basis of the evidentiary hearing, which the court entered on September 28, 1990, and are hereby incorporated and attached to this memorandum.

Both parties agree in objecting to the application of the guidelines to the facts in the PSI. The PSI states that Count I falls under the ten year mandatory minimum sentence of 18 U.S.C. § 841(b)(1)(A)(viii), for more than 100 grams of a mixture containing methamphetamine. The government argues that this was a typographical error in the United States Code, which should have read "1000 grams" instead of "100 grams" in this subsection; it points to the legislative history, the overall statutory scheme, and the relation between this scheme and the sentencing guidelines to support this position. The defendant agrees, and also argues that the defendant's amount of methamphetamine (946.9 grams) actually fits under two separate mandatory minimum sentence provisions – both a ten year mandatory minimum sentence, § 841(b)(1)(A)(viii), and a five year mandatory minimum sentence, § 841(b)(1)(B)(viii). The defendant argues that under the rule of lenity, whereby conflicting or ambiguous criminal statutes are interpreted in favor of the defendant, he should be subject to the lower mandatory minimum.

The court concludes that the amount of methamphetamine for which the defendant is accountable, 946.9 grams, fits under two separate statutory mandatory minimum sentences. Under the rule of lenity, the court will apply the lesser penalty as the statutory mandatory minimum sentence.

Accordingly, the court determines that the applicable guidelines are:

Total Offense Level: 28

Criminal History Category: I

78 to 97 months imprisonment for Count I, and 60 months imprisonment, consecutive, for Count II

4 years to life supervised release

$12,500 to $2,000,000 fine (plus cost of imprisonment or supervision)

$100 special assessment

III. IMPOSITION OF SENTENCE AND STATEMENT OF REASONS

Kenneth Eugene Bousley, you have been charged in Count I of the indictment with knowingly and intentionally possessing with intent to distribute methamphetamine, in violation of Title 21, United States Code, section 841(a)(1), and in Count II of the indictment with knowingly and intentionally using firearms in relation to a drug trafficking crime, in violation of Title 18, United States Code, section 924(c).

Based upon your plea of guilty to that charge, it is considered and adjudged that you are guilty of that offense.

THEREFORE, IT IS ADJUDGED:

that on count I, you are committed to the custody of the Bureau of Prisons for imprisonment for a term of 78 months;

that on count II, you are committed to the custody of the Bureau of Prisons for imprisonment for a term of 60 months, to be served consecutively to the term imposed for count I.

IT IS FURTHER ADJUDGED:

that on count I, pursuant to 21 U.S.C. § 841 you are to serve a term of supervised release of 4 years, and that on count II, pursuant to 18 U.S.C. § 3583 you are to serve a term of supervised release of 3 years to run concurrently with the term of supervised release imposed for count I, upon the following terms and conditions:

1. that you not commit any crimes, federal, state, or local;
2. that you abide by the standard conditions of supervised release recommended by the Sentencing Commission;
3. that you not possess any firearms or dangerous weapons;
4. that you submit to periodic drug testing at least every 60 days and participate in substance abuse programing at the direction of the U.S. Probation Office.

that pursuant to 18 U.S.C. § 3013, you are to pay to the United States a Special Assessment of $100, due immediately.

Reasons for Imposing Sentence Within Guideline Range

The court finds that the sentence of imprisonment called for by the guidelines is appropriate in this case and that there are no aggravating or mitigating circumstances not adequately considered by the Guidelines.

Fine

A fine is not imposed in this case because defendant is apparently unable to pay a fine due to his lack of assets and pending incarceration.

Plea Agreement

The court has accepted a plea agreement in this case because it is satisfied that the agreement adequately reflects the seriousness of the defendant's offense behavior and that accepting the plea agreement will not undermine the statutory purposes of sentencing.

Dated: 11/5/90

/s/ Diana E. Murphy
Diana E. Murphy
United States District Judge

PETITION FOR WRIT OF HABEAS CORPUS
UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

PERSONS IN FEDERAL CUSTODY

KENNETH EUGENE BOUSLEY Full name and prisoner number of petitioner 04450-041	Case No. 5-94-87 (To be supplied by the Clerk of the U. S. District Court)
JOSEPH M. BROOKS, WARDEN Name of Respondent	(Filed Jul. 05, 1994)

INSTRUCTIONS - READ CAREFULLY

In order for this petition to receive consideration by the U.S. District Court, it shall be in writing (legibly handwritten or typewritten), signed by the petitioner and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, petitioner may finish his answer to a particular question on the reverse side of the page or on an additional blank page. Petitioner shall make it clear to which question any such continued answer refers.

Since every petition for habeas corpus must be sworn to under oath, the false statement of a material fact

therein may serve as the basis of prosecution and conviction for perjury, Petitioners should therefore exercise care to assure that all answers are true and correct.

If the petition is taken *in forma pauperis*, it shall include an Application To Proceed In Forma Pauperis (AO 240) setting forth information which establishes that petitioner will be unable to pay the fees and costs of the habeas corpus proceedings. When the petition is completed, *the original and one copy* shall be mailed to the Clerk of the United States District Court for the District of Minnesota, 417 Federal Building, 515 West 1st Street, Duluth, Minnesota 55802-1397

1. Place of detention FPC DULUTH, DULUTH, MINNESOTA

2. Name and location of court which imposed sentence UNITED STATES DISTRICT COURT DISTRICT OF MINNESOTA – FOURTH DIVISION

3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:

   (a) CRIMINAL NUMBER 4-90-57 (SUPERSEDING INDICTMENT)

   (b) _____

   (c) _____

4. The date upon which sentence was imposed and the terms of the sentence:

   (a) NOVEMBER 2, 1990

   (b) COUNT I – (21 U.S.C. §841(A)(1)) – 78 MONTHS

   (c) COUNT II – (18 U.S.C. §924(C) – 60 MONTHS (CONSECUTIVE)

5. Check whether a finding of guilty was made

   (a) After a plea of guilty XXX

   (b) After a plea of not guilty _____

   (c) After a plea of nolo contendere _____

6. If you were found guilty after a plea of not guilty, check whether that finding was made by:

   (a) A jury N/A

   (b) A judge without a jury N/A

7. Did you appeal the judgment of conviction or the imposition of sentence?

   YES

8. If you answered "yes" to (7), list:

   (a) The name of each court to which you appealed

      i. UNITED STATES COURT OF APPEALS – 8TH CIRCUIT (APPEALED ON COUNT I, ONLY)

      ii. _____

      iii. _____

   (b) The result in each such court to which appealed

      i. AFFIRMED

      ii. _____

      iii. _____

(c) The date of each such result

i. UNKNOWN

ii. _____

iii. _____

(d) If known, citations of any written opinions or orders entered pursuant to such results.

i. UNKNOWN

ii. _____

iii. _____

9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully.

(a) THE CONVICTION AND SENTENCE WERE IMPOSED IN CONTRAVENTION TO THE UNITED STATES CONSTITUTION AND THE LAWS OF THE UNITED STATES SINCE A FACTUAL BASIS DID NOT EXIST FOR THE GUILTY PLEA ON COUNT II, 28 U.S.C. §924(C). (SEE ATTACHED PLEADINGS.)

(b)

(c)

10. State concisely and in the same order the facts which support each of the grounds set out in (9):

(a) SEE ATTACHED PLEADINGS.

(b)

(c)

11. Have you filed previous petitions for habeas corpus, motions under Section 2255 of Title 28, United States code, or any other applications, Petitions or motions with respect to this conviction?

NO

12. If you answered "yes" to (11), list with respect to each petition, motion or application:

(a) The specific nature thereof:

i. N/A

ii. _____

iii. _____

(b) The name and location of the court in which each was filed:

i. _____

ii. _____

iii. _____

(c) The disposition thereof:

i. _____

ii. _____

iii. _____

12. (Continued)

(d) The date of each such disposition:

i. _____

ii. _____

iii. _____

(e) If known, citations of any written opinions or orders entered pursuant to each such disposition:

i. _____

ii. _____

iii. _____

13. If you did not file a motion under Section 2255 of Title 28, United States code, or if you filed such a motion and it was denied, state why your remedy by way of such motion is inadequate or ineffective to test the legality of your detention:

(a) N/A

(b)

(c)

14. Has any ground set forth in (9) been previously presented to this or any other federal court by way of petition for habeas corpus, motion under Section 2255 of Title 28, United States Code, or any other petition, motion or application?

NO

15. If you answered "yes" to (14), identify:

(a) Which grounds have been previously presented:

i. N/A

ii. _____

iii. _____

(b) The proceedings in which each ground was raised:

i. _____

ii. _____

iii. _____

16. Were you represented by an attorney at any time during the course of:

(a) Your appearance before a United States Commissioner? ____

(b) Your arraignment and plea? YES

(c) Your trial, if any? _____

(d) Your sentencing? YES

(e) Your appeal, if any, from the judgment of conviction or the imposition of sentence?

YES

(f) Preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?

NO

17. If you answered "yes" to one or more parts of (16), list:

(a) The name and address of each attorney who represented you:

i. MARK PETERSON
250 NORTHSTAR EAST
608 SECOND AVENUE SOUTH
MINNEAPOLIS, MN 55402-1910

ii. _____

iii. _____

17. (Continued)

(b) The proceedings at which each such attorney represented you:

i. PLEA 6/15/9

ii. SENTENCING 11/2/90
APPEAL OF COUNT I

iii. EVIDENCIARY HEARING 9/28/90

18. If you are seeking leave to proceed *in forma pauperis*, have you completed the sworn affidavit setting forth the required information (see instructions, page 1 of this form?) YES

/s/ Kenneth E. Bousley
Signature of petitioner

)
)
)
)

___, being first sworn under oath, presents that he has subscribed to the foregoing petition and does state that the information therein is true and correct to the best of his knowledge and belief.

Signature of Affiant

SUBSCRIBED AND SWORN to before me this _____ day of _____, _____
(month)(year)

Notary Public

My commission expires:

(Month, Day, Year)

NOTARIZATION IS *NOT* NECESSARY IF THE FOLLOWING STATEMENT IS COMPLETED:

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: 6-23-94
(Date)

/s/ Kenneth E. Bousley
(Signature)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIFTH DIVISION

Kenneth Eugene Bousley, Petitioner,	)	
v.	)	Case No. _____
Joseph M. Brooks, Warden, FPC Duluth, Respondent.	)	

Petition for Writ of Habeas Corpus

The petitioner, Kenneth Eugene Bousley, currently incarcerated at the Federal Prison Camp, Duluth, Minnesota, respectfully requests that this Honorable Court grants his Petition for Writ of Habeas Corpus, and pursuant to 28 U.S.C. ¶2241, and in furtherance thereof, states as follows:

Parties

1. The petitioner is currently incarcerated, serving a sentence imposed by a United States District Court, at the Federal Prison Camp, Duluth.

2. The respondent is the warden of the Federal Prison Camp, Duluth, and is named as the respondent in his official capacity only.

Jurisdiction & Venue

3. This court has jurisdiction to adjudicate this petition pursuant to 28 U.S.C. ¶2241(a) and 28 U.S.C. ¶2242.

4. Venue is proper in this court pursuant to 28 U.S.C. ¶1402(a).

Statement of Facts

5. Petitioner Kenneth Eugene Bousley ("Bousley") was indicted in the District of Minnesota. The indictment alleged *inter alia*, (1) possession with intent to distribute methamphetamine, 21 U.S.C. ¶841(a)(1); (2) use of firearms during and in relation to a drug trafficking crime, 18 U.S.C. ¶924(c). (See Presentence Report, attached as Exhibit A.)

6. On June 15, 1990, petitioner Bousley pled guilty to Counts I and II of the indictment. (See Exhibit A.)

7. Petitioner Bousley pled guilty to Count I of the indictment, and testified to support the guilty plea that he engaged in drug trafficking out of his garage. (See Exhibit B, pp. 11-13.) The garage in question is a detached garage, and is approximately fifty (50) feet from the house where the guns were found. (See Exhibit D, Application for Search Warrant & Supporting Affidavit.) As the petitioner testified at the plea, he has an artificial leg. (See Exhibit B.) With the aid of a cane, the petitioner can move about, but not quickly.

8. When petitioner Bousley entered his guilty plea to both Counts I and II, U.S. District Judge Diane E. Murphy, pursuant to F.R.Cr.P. 11(f) asked the petitioner for the factual basis for his proposed guilty plea to Count II of the indictment. The relevant portion of the allocution which resulted is as follows:

* * *

THE COURT: And Count II do you know what you were charged with in that count? Can you tell me?

DEFENDANT BOUSLEY: Possession of a firearm.

THE COURT: Okay. Now, it also charges you with possessingthe firearms during, in, and in relation to a drug trafficking crime, the type of crime that was referred to in Count I. Would you tell me what kind of weapons you had at the time in question?

DEFENDANT BOUSLEY: There was a .22 four-shot derringer and a PBK 380 automatic pistol.

* * *

BY MR. PAULSEN [ASSISTANT U.S. ATTORNEY]:

Q. Now, with respect to these two guns you just mentioned, the 380 and the .22, those were found in your bedroom, is that right?

A. Yes.

Q. And that was near that 6.9 grams of methamphetamine that you talked about before, right?

A. Yes.

* * *

Q. All right. Now, had you been doing some of the selling of the methamphetamine out of your house as opposed to out of your garage?

A. No.

Q. These guns that were found in your bedroom, how were those connected with the drug trafficking? Were those available for you to use in case something went wrong in drug trafficking?

A. No. They were there for protection –

MR. PETERSON: First of all, there's no dispute that the guns were yours, is that correct?

DEFENDANT BOUSLEY: Right.

MR. PETERSON: And, in the past, you had sold drugs from the area of your residence, is that correct?

DEFENDANT BOUSLEY: In the garage, yes.

* * *

BY MR. PAULSEN:

Q. Those guns were loaded, by the way, when they were found in your bedroom, correct?

A. The .22 four-shot was.

Q. And that was found in the headboard of the bed?

A. Yes, in a tape box.

Q. So it was pretty easily accessible of [sic] you needed to get to it in a hurry?

A. Well, it was under other boxes, other video cassette boxes, and inside a video cassette box.

THE COURT: Do you understand, Mr. Bousley, if you wanted to contest whether you were guilty to Count II or not, whether those firearms were related to your drug trafficking, if you wanted to contest that,

you'd have to go to trial to do that, do you understand, but that you can do that? Do you understand that?

DEFENDANT BOUSLEY: Yes, Your Honor. But I was just saying what I meant is, they weren't right out in the open. You know, I couldn't just reach over and grab it.

* * *

(See Transcript of Proceedings, Change of Plea, June 15, 1990, pp. 13-16; attached as Exhibit B.)

9. The Presentence Report indicates that the purpose of the firearm was *not* for drug trafficking, but for the protection of the defendant's girlfriend that lived in and jointly owned the house, who had been raped previously. (See Exhibit A, pg. 3, item 16.)

10. The District Court imposed sentence on November 2, 1990. Petitioner was sentenced to 78 months on Count I. On Count II, petitioner was sentenced to an additional 60 months to be served consecutively to the term of imprisonment imposed for Count I. (See Judgment In A Criminal Case, attached as Exhibit C.)

Legal Allegations

11. Petitioner realleges and incorporates by reference paragraphs 1 through 10 of the petition.

12. The statutory authority for this petition is 28 U.S.C. ¶2241, which permits a judgment of conviction of an U.S. District Court may be challenged if it is imposed in violation of the laws and/or Constitution of the United States.

13. The conviction of the petitioner violates the laws and Constitution of the United States, on the following bases:

A. There is insufficient evidence to support the petitioner's conviction, and;

B. The plea allocution proffered by the petitioner was insufficient, since it did not indicate and [sic] connection between the firearms in the bedroom of the house, and the garage, where the drug trafficking occurred.

Conclusion

WHEREFORE, based on the foregoing, petitioner respectfully requests that this Honorable Court grant his Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. ¶2241.

Respectfully submitted,

/s/ Kenneth E. Bousley
Kenneth Eugene Bousley
Appearing *Pro Se*
Reg. No. 04450-041
Dorm 209, Room 116
P.O. Box 1000
Duluth, MN 55814

Dated: 6-6-94

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIFTH DIVISION

Kenneth Eugene Bousley,	)	
Petitioner,	)	
v.	)	Case No. _____
Joseph M. Brooks, Warden, FPC Duluth,	)	
Respondent.	)	

Memorandum of Law in Support
of Petition for Writ of Habeas Corpus

Argument

THIS COURT SHOULD GRANT THE PETITION, SINCE THERE IS INSUFFICIENT EVIDENCE TO SUPPORT A GUILTY PLEA ON COUNT II OF THE INDICTMENT.

A. Introduction

The issue in petition is very direct: did the petitioner's plea allocution set forth a proper factual basis, pursuant to F.R.Cr.P. 11(f) to support a conviction under Count II of the indictment?

B. Plea Allocution Was Insufficient

F.R.Cr.P. 11 sets forth the procedural basis for a defendant entering a guilty plea to a criminal charge. Specifically, F.R.Cr.P. 11(f) requires that the court accepting the guilty plea make inquiry into the factual basis for the plea. The relevant portion of F.R.Cr.P. 11(f) is set forth as follows:

> **Determining Accuracy of Plea.** Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

The Eighth Circuit has set a well defined standard for the factual basis which is required to support a guilty plea. In the recent case of *U.S. v. Schaefer*, 4 F.3d 679 (8th Cir. 1993), the Court reiterated that there must be a factual basis for the plea. (See *Shaefer*, pg. 681; see also *U.S. v. Oldham*, 787 F.2d 454 (8th Cir. 1986).

C. There is no legal basis for finding that the petitioner "used" a firearm "during and in relation to" a drug trafficking crime.

The United States Court of Appeals for the Eighth Circuit has repeatedly dealt with this issue of "use" of a firearm, as prohibited by 18 U.S.C. ¶924(c). A problem area for the Eighth Circuit has continued to be the required proximity between the firearm and the drug transaction.

The Court of Appeals in two cases has described close factual cases where the issue before the court was the physical and practical proximity of the firearm to the drug transaction. In *U.S. v. Curry*, 911 F.2d 72 (8th Cir. 1990), the defendant was convicted under 18 U.S.C. ¶924(c). Defendant's residence was a townhouse. When searched, police found a substantial quantity of cocaine, drug paraphernalia, large sums of cash, two guns and ammunition. The first floor closet contained a large suitcase containing 388 grams of 97% pure cocaine. On the

second floor of the townhouse was an operable, fully loaded .357 caliber revolver. This firearm was found, together with a .38 caliber revolver, in a master bedroom closet. (See *Curry*, pp. 78-79.)

Defendant Curry appealed on the basis that the evidence was insufficient to support the district court's finding that defendant "used" a firearm "during and in relation" to a drug trafficking transaction. (See *Curry*, pg. 78.) Although the Court of Appeals rejected defendant Curry's argument, the Court indicated that the " . . . facts here present a much closer question than those in our previous cases affirming conviction under ¶924(c)(1)." (See *Curry*, pg. 80.) The Court cited *U.S. v. Lyman*, 892 F.2d 751 (8th Cir. 1989) for the principal that, "[M]ore than mere possession of a firearm is required for a conviction under ¶924(c)(1)." The Court of Appeals narrowly rejected defendant Curry's position, cited among the factors were that Curry's drugs supply consisted not of small amounts of controlled substances.

In this case, the amount of drugs were insignificant, since the firearms in question were in a totally separate building from the garage, where the drug transaction occurred. The house where the guns were located was fifty feet from the garage. This distance, together with the petitioner's artificial leg, would have made it difficult indeed for the firearms to be used "during and in relation" to a drug trafficking transaction.

The Court of Appeals again grappled with this same issue in *U.S. v. Bennett*, 956 F.2d 1476 (8th Cir. 1992). Defendant Bennett had an apartment where he conducted drug transactions. When the apartment was searched,

police found drugs, paraphernalia and $2700 cash in the living area. One loaded .41 magnum was found in the closet of the bedroom in the apartment. (See *Bennett*, pg. 1482) Defendant argued that there was insufficient evidence to support a conviction under 18 U.S.C. ¶924(c).

As with *Curry*, the Court rejected defendant Bennett's argument, although the Court did state, "[I]n *Curry* we stated that it's facts presented a much closer question than those in any of our previous cases affirming convictions under ¶924(c) (1) . . . The evidence here . . . presents a closer question than *Curry*." (See *Bennett*, pg. 1483.) In *Bennett*, the firearm was in a different room in an apartment, and the Court of Appeals called this a close question. The facts, as set forth in the petition, clearly demonstrate facts which present a much closer question. The instant case facts show that the firearm was in the bedroom of a house, and the drug transaction occurred approximately fifty (50) feet away in the garage.

The Eighth Circuit has consistently rejected appeals from ¶924(c) convictions with facts much less persuasive and clear than those in the instant case. (See *U.S. v. LaGuardia*, 774 F.2d 317 (8th Cir. 1985)) (firearms found in small apartment in which 17 ounces of cocaine and cash were found sufficient to establish defendant's use of firearm); (*U.S. v. Brett*, 872 F.2d 1365 (8th Cir. 1989)) (evidence that loaded nine millimeter pistol was found in codefendant's possession during search of crack cocaine house was sufficient to support defendant's conviction); (*U.S. v. Jones*, 990 F.2d 1047 (8th. Cir. 1993)) (gun hanging on back of bedroom door adjacent to bedroom closet with cash and drugs).

One of the few times that the Eighth Circuit reversed a ¶924(c) conviction was in *U.S. v. Robertson*, 706 F.2d 253 (8th Cir. 1983). In *Robertson*, a loanshark victim who saw a gun in a desk drawer presented insufficient evidence to support a ¶924(c) conviction. The reasoning in *Robertson* was the same as this court should employ: that there was no role of the firearm in the criminal transaction. (See *Robertson*, pg. 256.)

Conclusion

In light of the foregoing, petitioner Kenneth Eugene Bousley respectfully requests that this Honorable Court grant his Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. ¶2241.

Respectfully submitted,

/s/ Kenneth E. Bousley
KENNETH EUGENE BOUSLEY
Appearing *Pro Se*
Reg. No. 04450-041
Dorm 209, Room 116
P.O. Box 1000
Duluth, MN 55814

Dated: 6-6-94

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIFTH DIVISION

****

Kenneth Eugene Bousley,
Petitioner,
vs.
Joseph M. Brooks, Warden,
Respondent.

ORDER DIRECTING RESPONDENT TO SHOW CAUSE WHY WRIT OF HABEAS CORPUS SHOULD NOT BE GRANTED
and
REPORT AND RECOMMENDATION

Civ. No. 5-94-87
(Filed Jul. 6, 1994)

****

At Duluth, in the District of Minnesota, this 6th day of July, 1994.

* * *

This matter is before the undersigned United States Magistrate Judge pursuant to a general assignment, made in accordance with the provisions of Title 28 U.S.C. § 636(b)(1)(A) and (B), upon the filing of a Petition for a Writ of Habeas Corpus, pursuant to Title 28 U.S.C. § 2241. In this Petition, the Petitioner claims that he is being illegally detained by the Respondent for reasons which are violative of his rights under the Constitution, laws or treaties of the United States. Pursuant to the Court's routine, random assignment of Section 2241 Petitions, the Petition has been committed to the Honorable Michael J. Davis for final determination.

The Petition asserts that his conviction and sentence are illegal "since a factual basis did not exist for the guilty plea" underlying his conviction for use of a firearm during and in relation to a drug trafficking crime, in violation of Title 18 U.S.C. § 924(c). See, *Petition Form*, at 3. Specifically, the Petitioner asserts that "the plea allocution proffered by the petitioner was insufficient, since it did not indicate [a] connection between the firearms in the bedroom of the house, and the garage, where the drug trafficking occurred." *Petition Attachment*, at 5. The Petitioner entered his plea of guilty on one Count of a violation of Section 924(c), as well as one Count of possession with intent to distribute methamphetamine in violation of Title 18 U.S.C. § 841(a)(1), before the United States District Court for the District of Minnesota, the Honorable Diana E. Murphy, Chief Judge, presiding ("the Sentencing Court").

Upon review, it is evident that the Petitioner's contentions rest exclusively within the jurisdiction of the Sentencing Court, pursuant to Title 28 U.S.C. § 2255.[1]

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[1] In relevant part, Section 2255 provides as follows:

> A prisoner in custody under a sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such a sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

As the language of Section 2255 makes clear, challenges to the legitimacy of an underlying conviction, or to a sentence which

As a consequence, these contentions are inappropriate subjects of a Writ under Section 2241.[2] In order to minimize any inconvenience to the Court and to the parties, we recommend that this Petition be reassigned to the Sentencing Court, which would have the requisite jurisdiction to resolve each of the claims that the Petitioner has raised.

NOW, THEREFORE, The Respondent is directed to show cause, within 20 days from the date of this Order, why relief should not be granted pursuant to Title 28 U.S.C. §§ 2241 or 2255:

1. By making a Return in writing;

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was imposed upon that conviction, are exclusively governed by this Section, which vests the jurisdiction of such matters in the Sentencing Court. It is well-settled in this Circuit, that a Section 2241 Writ is limited to objections to the manner in which a sentence is being executed, and not to the validity of the sentence itself or the authority by which the Petitioner is being detained. *United States v. Hutchings*, 835 F.2d 185, 186 (8th Cir. 1987); *DiSimone v. Lacy*, 805 F.2d 321, 323 (8th Cir. 1986).

[2] Section 2255 goes on to provide:

> An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

See also, *DiSimone v. Lacy*, 805 F.2d 321, 323 (8th Cir. 1986); *Von Ludwitz v. Ralston*, 716 F.2d 528 (8th Cir. 1983) (per curiam); *Edwards v. United States*, 826 F. Supp. 423, 426 (M.D.Fla. 1993).

2. By filing with the Court a reasoned memorandum of law and fact fully stating the Respondents' legal position, and their view on the need for this Court to conduct an evidentiary hearing on the merits of the Petition given the requirements of the applicable statutes and the pertinent United States Supreme Court authorities.

Absent compliance with this Order within the 20-day period, the Court will entertain a motion to grant relief to the Petitioner forthwith.

AND, It is –

RECOMMENDED:

That this Petition be reassigned for disposition to the Honorable Diana E. Murphy, Chief Judge.

/s/ Raymond L. Erickson
Raymond L. Erickson
UNITED STATES
MAGISTRATE JUDGE

NOTICE

Pursuant to Rule 6(a), Federal Rules of Civil Procedure, D. Minn. LR1.1(f), and D. Minn. LR72.1(c)(2), any party may object to this Report and Recommendation by filing with the Clerk of Court, and by serving upon all parties **by no later than July 21, 1994,** 1994, a writing which specifically identifies those portions of the Report to which objections are made and the bases of those objections. Failure to comply with this procedure shall operate as a forfeiture of the objecting party's right to seek review in the Court of Appeals.

If the consideration of the objections requires a review of a transcript of a Hearing, then the party making the objections shall timely order and file a complete transcript of that Hearing **by no later than July 21, 1994,** unless all interested parties stipulate that the District Court is not required by Title 28 U.S.C. § 636 to review the transcript in order to resolve all of the objections made.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIFTH DIVISION
Civil No. 5-94-87
Criminal No. 4-90-57

UNITED STATES OF AMERICA, Respondent, v. KENNETH EUGENE BOUSLEY, Petitioner.	**MOTION OF THE UNITED STATES TO DISMISS DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT** (Filed July 21, 1994)

Pursuant to Federal Rules of Civil Procedure 12 and 56, the United States, by its undersigned counsel, hereby moves to dismiss the above-captioned case with prejudice, or in the alternative moves for summary judgment.

The grounds for this motion are set forth in the accompanying memorandum. A proposed Order accompanies this motion.

Respectfully submitted,

Dated: 7/21/94

DAVID L. LILLEHAUG
United States Attorney

/s/ Jeffrey S. Paulsen

BY: JEFFREY S. PAULSEN
Assistant U.S. Attorney
Attorney ID Number 144332

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIFTH DIVISION
Civil No. 5-94-87
Criminal No. 4-90-57

UNITED STATES OF AMERICA, Respondent, v. KENNETH EUGENE BOUSLEY, Petitioner.	**MEMORANDUM IN SUPPORT OF MOTION OF THE UNITED STATES TO DISMISS DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS**

The defendant, Kenneth Eugene Bousley, has filed a Petition for Writ of Habeas Corpus on the ground that there allegedly was an insufficient factual basis for his guilty plea to using a firearm during and in relation to a drug trafficking offense. In a Report and Recommendation issued July 6, 1994, Magistrate Judge Erickson recommended treating this petition as a petition under 28 U.S.C. § 2255. Because the transcript shows clearly that an adequate factual basis was made, the defendant's petition should be denied and the case should be dismissed with prejudice.

FACTUAL BACKGROUND

On March 19, 1990, officers executed a search warrant at Bousley's residence at 5239 Humboldt Avenue North, Minneapolis, Minnesota. PSR ¶ 8 (Exhibit A to Defendant's Petition). Officers found approximately 7

pounds (3,153 grams) of methamphetamine in two separate briefcases in the garage. PSR ¶ 8. Two loaded firearms and one unloaded firearm were found with the drugs in the garage. *Id.* A coffee can containing an additional 33 grams of methamphetamine also was found in the garage. *Id.*

In the house, officers found 6.9 grams of methamphetamine in the bedroom along with two loaded handguns. *Id.* One of the loaded guns was concealed in the headboard of the bed. T.Plea at 16. Officers also seized $4,838 in cash during execution of the search warrant. PSR at ¶ 8.

On June 15, 1990, the defendant pleaded guilty to Count I of the Superseding Indictment charging possession with intent to distribute methamphetamine, and Count II charging use of firearms during and in relation to a drug trafficking crime. He signed a written plea agreement acknowledging his guilt as to both charges. (Exhibit A at 1-3)[1]

At the guilty plea hearing, the defendant denied responsibility for the 7 pounds of methamphetamine in the briefcases in the garage, but admitted that the 33 grams in the coffee can and the 6.9 grams in the bedroom were his. T.Plea at 12. He further admitted that the 33 grams in the coffee can was methamphetamine he was planning to sell. *Id.* He also admitted that he had in fact made sales of methamphetamine from the garage area of his residence in the past, T.Plea at 15, including sales

[1] The original, fully executed plea agreement is in the archives of the Clerk's Office.

within the previous 72 hours prior to his arrest, T.Plea at 17.

With respect to the gun count, the defendant started to proffer an innocent excuse for the guns, but ultimately admitted that the firearms in the bedroom were available to assist him in his drug business. T.Plea at 15. The Court twice informed Bousley that he had the right to go to trial if he did not feel he was guilty of the gun offense. T.Plea at 16. The defendant voluntarily chose to continue with his plea of guilty. *Id.*

Prior to sentencing, the district court held an evidentiary hearing regarding the drug quantity for which the defendant was accountable. The defendant had the opportunity at that hearing, if he so chose, to make a record regarding his guilt or non-guilt of the gun charge. However, through his counsel, he specifically stated that there was no need to make a further factual record regarding the gun count to which he pleaded guilty. (Exhibit B at 3.)

DISCUSSION

I. THE DEFENDANT'S PETITION IS BARRED BY HIS FAILURE TO TAKE A DIRECT APPEAL ON THE ISSUE IN QUESTION

Bousley's petition is barred by his failure to take a direct appeal on the issue in question. The defendant did appeal to the Eighth Circuit, but raised only the issue of the drug quantity for which he is accountable. The Eighth Circuit affirmed his sentence. *United States v. Bousley*, 950 F.2d 727 (8th Cir. 1991)(unpublished). The defendant

could have, but did not, challenge on appeal the adequacy of the factual basis for his plea to Count II, the gun count.

The defendant has waived his right to challenge the sufficiency of his guilty plea by failing to take a direct appeal on the issue. A motion under 28 U.S.C. § 2255 is not a substitute for a direct appeal. *Reid v. United States*, 976 F.2d 446, 447 (8th Cir. 1992), *cert. denied*, 113 S.Ct. 1351 (1993)(citing *United States v. Frady*, 456 U.S. 152, 165 (1982)). Any claims which could have been raised on direct appeal will not be considered in a Section 2255 proceeding unless the defendant can show just cause for failing to raise the claim on direct appeal, and that substantial, actual prejudice resulted from the alleged errors. *Ford v. United States*, 983 F.2d 897, 898 (8th Cir. 1993) (per curiam). The defendant has made no such showing. Thus, the defendant's failure to challenge the adequacy of his guilty plea on direct appeal precludes him from raising that issue now.

II. AN ADEQUATE FACTUAL BASIS EXISTS FOR THE DEFENDANT'S PLEA TO COUNT II

In the event the Court reaches the merits, a conviction under 18 U.S.C. § 924(c) is sustainable if the firearm furthered the drug activity in any way. *United States v. LaGuardia*, 774 F.2d 317, 321 (8th Cir. 1985); *see also United States v. Brett*, 872 F.2d 1365, 1370 (8th Cir.), *cert. denied*, 493 U.S. 932 (1989). The "use" element of § 924(c) is met when the defendant has "ready access" to the firearm, the firearm "was an integral part of his criminal undertaking

and its availability increased the likelihood that the criminal undertaking would succeed." *United States v. Matra*, 841 F.2d 837, 843 (8th Cir. 1988). A defendant can "use" a firearm within the meaning of § 924(c) without firing, brandishing, or displaying it. *Lyman*, 892 F.2d at 753; *Matra*, 841 F.2d at 843.

The record in this case provides more than an adequate factual basis for the plea to Count II. The defendant kept a loaded handgun in the headboard of his bed, a readily accessible location. The defendant admitted making methamphetamine sales from the garage area of the residence, and further admitted that the guns in the bedroom were available to facilitate that drug dealing. In addition to his oral testimony, the defendant also signed a written acknowledgment of his guilt on Count II (Exhibit A at 2-3), which by itself is sufficient to sustain the conviction. *United States v. Boucher*, 909 F.2d 1170, 1175 (8th Cir.), *cert. denied*, 498 U.S. 942 (1990); *United States v. Guichard*, 779 F.2d 1139, 1146 (5th Cir.), *cert. denied*, 475 U.S. 1127 (1986).

The Eighth Circuit on at least two occasions has upheld guilty pleas in § 924(c) cases under similar circumstances. In *Thomas v. United States*, 951 F.2d 902, 904 (8th Cir. 1991), the defendant admitted being a drug trafficker and also admitted ownership of three of the five weapons found in his bedroom when he was arrested. He denied, however, that the guns had anything to do with the drug trafficking. Despite the defendant's denial, the Eighth Circuit found a sufficient factual basis for his guilty plea to a § 924(c) count. 951 F.2d at 904.

Likewise, in *United States v. Boucher*, 909 F.2d 1170, 1175 (8th Cir.), *cert. denied*, 498 U.S. 942 (1990), the Eighth Circuit found a sufficient factual basis where the defendant signed a plea agreement acknowledging that firearms found in the cab of his truck were available for his use in connection with the marijuana he was hauling in a hidden bed of the truck.

As in these cases, the record in this case is more than adequate to sustain the defendant's conviction on Count II.

CONCLUSION

For the foregoing reasons, the defendant's Petition for a Writ of Habeas Corpus should be denied and this case should be dismissed.

Dated: 7/21/94

DAVID L. LILLEHAUG
United States Attorney

/s/ Jeffrey S. Paulsen
BY: JEFFREY S. PAULSEN
Assistant U.S. Attorney
Attorney ID Number 144332

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIFTH DIVISION

Kenneth Eugene Bousley, Petitioner,	)	
v.	)	Civil No. 5-94-87
Joseph M. Brooks, Warden, FPC Duluth, Respondent.	)	Crim. No. 4-90-57

Petitioner's Reply to Respondent's Motion to Dismiss or for Summary Judgment of Writ of Habeas Corpus

(Filed Aug. 12, 1994)

Introduction

Petitioner's argument is based on the undisputed court record that petitioner did not use a firearm during and in relations to a drug trafficking transaction. (See 18 U.S.C. ¶ 924(c); *See also* Transcript of Proceedings, Change of Plea, June 15, 1990, pp. 13 - 16, attached as Exhibit B to the Petition for Writ of Habeas Corpus. Hereinafter referred to as "Transcript".)

Respondent in turn argues that the petitioner testified that he used the firearms in relation to drug trafficking, and specifically argues the following points:

1. The petitioner did not take a direct appeal on the firearm issue, and:

2. A factual basis existed pursuant to F.R.Cr.P. 11(f) for the guilty plea.

In support of the second prong of his argument, respondent argues that case law supports his position, especially since the petitioner signed a plea agreement.

In light of the foregoing, petitioner files this reply, requesting the court to deny the respondent's requested relief.

Statement of Facts

[Please refer to ¶ 5 - 11, pp. 2 - 5,
Petition for Writ of Habeas Corpus, filed July 5, 1994.]

Argument I

PETITIONER IS NOT BARRED FROM FILING A MOTION PURSUANT TO 28 U.S.C. §2255

Respondent argues that, pursuant to *Ford v. United States*, 983 F.2d 897 (8th Cir. 1993) (per curiam), any claims which could have been raised on direct appeal will not be considered in a motion pursuant to 28 U.S.C. #2255 unless just cause and actual prejudice can be demonstrated. (See Memorandum In Support of Motion of the United States to Dismiss Defendant's Petition for Writ of Habeas Corpus, pp. 3 - 5.)

Petitioner was represented by Mark W. Peterson. It is an undisputed fact that the petitioner disagreed with his counsel's advise *before* petitioner pled guilty. (See August 3, 1990 Bousley letter to Peterson, and August 7, 1990 Peterson response to Bousley, attached as Exhibit A. *See also* August 22, 1990 Bousley letter to Peterson and Peterson August 27, 1990 response, attached as Exhibit B.)

Even after the plea change, petitioner requested his counsel to appeal the firearms count. Mr. Peterson refused to do so. In fact, Mr. Peterson refused to afford petitioner any post-conviction relief consideration. (See October 30, 1991 Peterson letter to Bousley, attached as Exhibit C.)

Therefore, petitioner could not bring this issue to the attention of the appellate courts, since the counsel who rendered the original advice was understandably reluctant to pursue an appeal which questions his own professional advice.

Argument II

A FACTUAL BASIS DID NOT EXIST FOR THE TRIAL COURT TO ACCEPT PETITIONER'S GUILTY PLEA.

The respondent argues two specific cases in which the Eighth Circuit has upheld guilty pleas in §924(c) cases. (See Respondent Memorandum, pg. 5.) The two cases cited by the respondent are distinguishable on their facts.

The first case cited by the respondent is *Thomas v. United States*, 951 F.2d 902 (8th Cir. 1991). Defendant Thomas filed a §2255 motion seeking to vacate his sentence pursuant to a guilt plea on a §924(c) charge. Thomas owned 3 of 5 firearms found in the bedroom of the home from where 428 grams of crack cocaine were recovered. Thomas was also arrested in this bedroom. (See *Thomas, supra*, pg. 904.) The Eighth Circuit found that a factual basis existed for the guilty plea, since through his testimony Thomas admitted to owning the

firearms which were in the same house as the 428 grams of crack. (See *Thomas, supra,* pg. 904.)

As has been argued by the petitioner in ¶ 8 of the Petition for Writ of Habeas Corpus, the guns in this case were found in Petitioner's bedroom, but the drug trafficking occurred in the petitioner's garage, *which is over fifty (50) feet away from the house.* This is unlike defendant Thomas' case, where the crack cocaine was in the same house as the firearms, and easily accessible to Thomas.

Furthermore, as pointed out in ¶7 of the Petition, Petitioner has an artificial leg, and with the aid of a cane, can move about, but not quickly. Therefore, the concept that two small caliber guns in a house over 50 feet away from the site of the drug trafficking is ridiculous and without a realistic factual basis.

The respondent argues that the petitioner ultimately admitted that the firearms in the bedroom were available to assist him in his drug business. (See Respondent's Memorandum, pp. 2 - 3.)

The respondent's interpretation of pg. 15 of the transcript reflects a very vivid imagination. Petitioner clearly testified that the firearms were not available for "use in case something went wrong in drug trafficking." (See Transcript, pg. 15.) Petitioner ultimately testified that the firearms were available only in a theoretical sense, since the petitioner owned the weapons. Petitioner testified, and it is undisputed, that the drug trafficking occurred in the garage. (See Transcript, pg. 15.) It is inconceivable that the petitioner, who has an artificial leg and walks only with the aid of a cane, could "run" to the house from the garage to retrieve a small caliber gun if "something

went wrong in drug trafficking." Any reasonable person can obviously see from these facts that the firearms were technically available, but not readily available.

The second case cited by respondent is *United States v. Boucher,* 909 F.2d 1170 (8th Cir. 1990). The Eighth Circuit found in this case that there was a sufficient factual basis to support a guilty plea where the defendant signed a plea agreement which acknowledged the underlying facts to support a § 924(c) conviction.

The relevance of this case is very questionable, since the respondent has not provided an executed copy of the plea agreement. The plea agreement provided by the respondent as Exhibit A to the respondent's memorandum appears to be a draft. Therefore, this argument is without any factual basis.

Conclusion

In view of the foregoing, this Court should grant the petition and deny the respondent's requested relief. The facts of the instant case are readily distinguishable from those cases advanced by the respondent. If the facts of this case are examined objectively, it is obvious that the petitioner has readily admitted what he actually did in violation of federal law. There was no connection between the drugs and the firearms in this case - the guns simply happened to be in the house well away from the drugs in the unattached garage.

In the event the Court is seriously considering granting the respondent's motion, Petitioner requests appointment of counsel and an opportunity for an evidenciary

hearing, so that the Court may hear the testimony of the petitioner on the points outlined in the petition and reply.

Respectfully Submitted,

/s/ Kenneth E. Bousley
Kenneth Eugene Bousley
Appearing *Pro Se*
Reg. No. 04450-041
Dorm 209, Room 116
P.O. Box 1000
Duluth, MN 55814

Dated: 8-8-94

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIFTH DIVISION

Kenneth Eugene Bousley, Petitioner,	)	
v.	)	Civil No. 5-94-87 Crim. No. 4-90-57
Joseph M. Brooks, Warden, FPC Duluth, Respondent.	)	

Certificate of Service

The undersigned, upon penalty of perjury, certifies that a copy of the Petitioner's Reply to Respondent's Motion to Dismiss or for Summary Judgment of Petitioner's Writ of Habeas Corpus, together with exhibits, was mailed to the attorney representing the respondent indicated below, by

placing same in the United States mail receptacle at the Federal Prison Camp, Duluth:

Jeffrey S. Paulson, AUSA
234 United State Courthouse
110 South Fourth Street
Minneapolis, MN 55401

/s/ Kenneth E. Bousley
Kenneth Eugene Bousley

Dated: 8-8-94

EXHIBIT A

Ken Bousley
5239 Humboldt Ave N
Minneapolis, MN 55430

August 3, 1990

Mark Peterson
Peterson & Singer
250 Northstar East
608 Second Avenue South
Minneapolis, MN 55402

Dear Mark:

You advised me that just the fact that I owned a gun made me guilty of the offense of use of a firearm during and in relation to drug trafficking, which was Count II of my indictment. But, after some research of my own, I find your statement to be untrue. Please read enclosed paper on "Use, Used."

The guns had nothing to do with drug transactions. The guns were in the house, and I was selling drugs out of the unattached garage. You said that "possession of" and "possession with intent" are two different offenses. The guns were in proximity only to the drugs that I possessed for my personal use, and not the drugs that I was selling. They were in two different buildings that are not attached. There was no ready access, nor were they used as an integral part of the offense with which I am charged.

The guns that I owned were: a PPK [sic] 380 and a four-shot .22, which the police found in the bedroom. The unloaded PPK [sic] 380 was in a cabinet next to the waterbed, on the bottom shelf, inside a vinyl bag that was zipped closed. The .22 four-shot that was loaded was in a video tape cassette box, under four or five other video cassette boxes, in the headboard of the waterbed.

I got the .22 derringer for my girlfriend, Jessie, because the slide on the PPK [sic] 380 would come back when it was fired, and if your hand was not holding it just right it would cut your hand. I wanted Jessie to have a gun because of the rape that happened to her shortly after we started seeing each other; the guy that broke into her house and raped her was never caught, and the emotional stress of all this was very hard on both of us – I never wanted anything like that to happen to her again. If it was not for the rape, I would not have had any guns around because of the kids. I won't even buy a toy gun for a kid, because I don't believe they are toys. I am not a violent person. The last fist fight I was in was back when I was still in school, and that was a long time ago.

Neither gun was in the garage, nor had ever been in the garage. I have never had ready access to a gun during any drug transaction, nor ever felt it was necessary to have a gun on or near me when I was selling drugs.

After reviewing this and the enclosed information, please call me so we can discuss this matter. Thank you.

Respectfully yours,

/s/ Ken Bousley
Ken Bousley

KB:jls

Enc

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DAVID L. WARG
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JEANNE M. HERMES
ADRIANE E. MESSICK

August 7, 1990

Kenneth E. Bousley
5239 Humboldt Avenue North
Minneapolis, MN 55430

Re: United states v. Kenneth E. Bousley

Dear Ken:

Enclosed please find the documents which have been filed on your behalf relative to sentencing, and also a copy of Magistrate Becker's Order modifying the conditions of your release.

I also am in receipt of your letter dated August 3, 1990, relative to the firearms count to which you pled guilty. My response is as follows.

1. I never advised you that "just the fact that (you) owned a gun . . . " made you guilty of the firearms offense. What I did tell you was that the law in the Eighth Circuit is clear that the mere presence and ready availability of a firearm at a location where drug dealing takes place constitutes "use" of a gun during a narcotics transaction. *United States v. Brett*, 872 F.2d 1365, 1370-71 (8th Cir.), *cert. denied* 110 S.Ct. 322 (1989); *United States v. Drew*, No. 88-2661, slip op. at 5 (8th Cir. January 17, 1990).

2. Although it is correct that more than mere possession is required for a conviction under the statute, it is not necessary that the person accused actually brandish or discharge the weapon in question. *United States v. Matra*, 841 F.2d 837, 843 (8th Cir. 1988); *United States v. Lyman*, No. 89-5157, slip op. at 5 (8th Cir. December 29, 1989).

3. The government does not have to establish the specific intent to use a weapon or weapons in connection with a drug offense. The circumstances surrounding the presence of a firearm at a location where drug transactions take place permit the inference that they are present to be available for possible use. See *United States v. LaGuardia*,

774 F.2d 317, 321 (8th Cir. 1985); *United States v. Foote*, No. 89-1715, slip op. at 8 (8th Cir. March 15, 1990).

4. None of the cases which you enclosed with your letter cause me to change my opinion that under the facts and circumstances of your case, you would have been convicted of Count II had you gone to trial.

You obviously are free to form your own opinion as to the validity of your conviction on the firearms count, and it may well be that you can find another lawyer who would not share my opinion, and believe that Count II is defensible. If you are not satisfied with my opinion, or the basis for that opinion, I encourage you to seek other representation, as you obviously should have confidence in the advice which you receive. Should you decide to do so, I suggest that you make arrangements quickly, as I anticipate that sentencing will be scheduled within the next two or three weeks.

If you have any questions about my position in this matter, please feel free to contact me.

Sincerely yours,

/s/ Mark W. Peterson
Mark W. Peterson

MWP/am
Enclosures

EXHIBIT B

August 22, 1990

Mark Peterson, Atty
Peterson & Singer
250 Northstar East
608 Second Avenue South
Minneapolis, MN 55402

Dear Mark:

Thank you for your letters dated August 7 and August 16, 1990. I am sorry if I upset you. Please try to understand, I am trying to show you why I feel so strongly that I am not guilty of use of a firearm.

I had my guns in the bedroom because when Jessie was raped, she was raped in her bedroom. She lived in north Minneapolis at the time; we still live in north Minneapolis; the guy who did it was never caught. I believe these are valid reasons for having the guns in the bedroom, and for having guns to start with.

I did have 6.9 grams of methamphetamine in the bedroom, but for my Personal use, not to bc sold. Also in the bedroom was about $4,800.00 in cash. Is the proximity of the guns to the money the reason you believe I would be convicted of count II? The 33 grams of meth. that I had to sell, my scale, and the baggies were in the *unattached* garage. I feel very strongly that this is important – I did not sell drugs from the building in which the guns were found.

All of the cases I have read so far have common factors, which, as I see them, are as follows: large quantities of drugs (18 ounces in one case), large sums of cash

($18,950.00 in one. case), drug paraphernalia, and guns, all of which were found in the same building. Also, there seems to have been no reason given for the presence of guns other than for drug dealing. The only case I understand to be similar to mine is U.S. v. Feliz-Cordero. In that case, the drug sale occurred in a separate residence from the one in which the gun was found – but the two residences were in the same building. The drug sale occurred in Apartment 5, the gun was found in Apartment 3.

In U.S. v. LaGuardia/Gato, how or why was Gato acquitted of the gun charge?

What are the facts and circumstances of my case that lead you to your belief that I would be found guilty if the case went to trial? As I see them, 1 think there is a good chance I would not be convicted of count II. Please help me to understand your viewpoint.

I made a mistake, and I am willing to accept responsibility for what I did, but I do not think it is just that I be charged with anything more, especially at the cost of 5 years of my life. Please try to understand that if I have to spend 5 years more for the guns, I don't want to spend them wondering why. Thank you for your help.

Respectfully yours,

/s/ Kenneth E. Bousley
Kenneth E. Bousley

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ADRIANE E. MESSICK

August 27, 1990

Kenneth E. Bousley
5239 Humboldt Avenue North
Minneapolis, MN 55430

Re: United States v. Kenneth E. Bousley

Dear Ken:

I am in receipt of your letter dated August 22, 1990. My response is as follows.

1. The primary factors upon which I base my opinion that you would have been convicted had you gone to trial on the firearms charge are as follows:

a) The presence of two firearms in your bedroom, which the police would testify were both loaded;

b) The presence of three firearms and seven pounds of methamphetamine in the briefcases in the garage;

c) Your admissions to both state and federal law enforcement officials regarding your activities in the garage and specifically your drug activity of the day before;

d) The amount of money seized;

e) The various drug-dealing paraphernalia which was seized, including the police scanners, additional ammunition, and money found in your bedroom; and

f) The close proximity of the garage to your house.

2. I have no idea why Ms. Gato was acquitted at trial. Apparently she was very lucky.

3. I obviously understand your desire to avoid spending any more time in prison than necessary. I also understand why you feel so strongly that you are not guilty of the firearms count, although I obviously disagree with the basis for your conclusion.

If you wish to have a jury trial on the firearm charge, you must first seek withdrawal of your guilty plea, pursuant to Rule 32(d), Federal Rules of Criminal Procedure. If it is your intent to try to withdraw your guilty plea, you should immediately obtain another lawyer to make that motion on your behalf.

Please contact me if you have any questions.

Sincerely yours,

/s/ Mark W. Peterson
Mark W. Peterson

MWP/am

EXHIBIT C

PETERSON & SINGER
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608 Second Avenue South
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MARK W. PETERSON
Criminal Trial Specialist
National Board of
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M. G. SINGER

In Association With
DAVID L. WARG
Legal Assistants
JEANNE M. HERMES
ADRIANE E. MESSICK

October 30, 1991

Kenneth E. Bousley
Reg. No. 04450-041
Federal Prison Camp
Box 1000, PMB 666
Duluth, MN 55814

Re: United States v. Kenneth Eugene Bousley

Dear Ken:

I am in receipt of your letter dated October 27, 1991. I will address the questions and concerns which you have to the best of my ability.

1. The only practical way in which to challenge the amount of drugs which Judge Murphy found constituted your relevant conduct is through a petition for a writ of habeas corpus. There is no procedure by which additional evidence, such as an affidavit from John Innen, can be made a part of the record and argued on appeal as a basis

for changing your sentence. The only way in which additional evidence can be produced is through a hearing in the district court, pursuant to a writ of habeas corpus.

2. I am not planning on filing a writ of habeas corpus on Count II, the firearms charge. The first reason is that my appointment on appeal does not include further proceedings before the district court. The second reason is that we have thoroughly discussed this issue before; it remains my view that you would have been convicted of this offense had you gone to trial; and it is still my opinion that the proper advice was to plead guilty to this offense. Finally, since it is the basis of my advice that you would be challenging in a habeas petition, it obviously would be a conflict of interest for me to represent you on that petition.

3. To the best of my knowledge, it is the Bureau of Prisons, and not the sentencing judge, which determines the credit which you are to receive against any sentence, including the time which you served under house arrest. If the Bureau of Prisons has determined that you should not receive credit for this time, you should first appeal that decision administratively through the Bureau of Prisons, and if you are not successful, you should petition the court for a writ of habeas corpus on that issue as well.

I hope that this letter answers, at least to the extent possible, the matters discussed in your letter. If you need further information, please contact me; if not, the best of luck to you in future proceedings.

Sincerely yours,

/s/ Mark W. Peterson
Mark W. Peterson

MWP/am

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIFTH DIVISION

****

Kenneth Eugene Bousley,
Reg. No. 04450-041,

Petitioner,

vs.

Joseph M. Brooks, Warden,

Respondent.

REPORT AND RECOMMENDATION

(Filed Mar. 14, 1995)

Civ. No. 5-94-87

****

At Duluth, in the District of Minnesota, this 14th day of March, 1995.

I. Introduction

This matter came before the undersigned United States Magistrate Judge pursuant to a general assignment, made in accordance with the provisions of Title 28 U.S.C. §636(b)(1)(B), upon a Petition for a Writ of Habeas Corpus. The Petitioner has appeared *pro se*, and the Respondent has appeared by Jeffrey S. Paulsen, Assistant United States Attorney.

For reasons which follow, we recommend that the Petition for a Writ of Habeas Corpus be dismissed.

II. Procedural and Factual History

On June 15, 1990, in the United States District Court for the District of Minnesota, the Petitioner entered pleas

of guilty on Counts I and II of a Superseding Indictment. In Count I, the Petitioner was charged with possessing, with an intent to distribute, methamphetamine, in violation of Title 21 U.S.C. §841(a)(1), while Count II charged him with using or carrying a firearm during and in relation to a drug trafficking offense, in violation of Title 18 U.S.C. §924(c).[1] These pleas were made during a Change of Plea Hearing.

On November 2, 1990, the District Court, the Honorable Diana E. Murphy presiding, sentenced the Petitioner to a term of 78 months for his conviction on Count I, to be followed by a consecutive sentence of 60 months for his conviction on Count II. The Petitioner is currently serving that sentence at the Federal Prison Camp at Duluth, Minnesota ("F.P.C., Duluth"). The Respondent is the Warden of that facility.

On July 5, 1994, the Petitioner filed this Petition for a Writ of Habeas Corpus, pursuant to Title 28 U.S.C. §2241, maintaining that there was an improper factual basis for his guilty plea on Count II of the Superseding Indictment. Necessarily, we treat the Petition as a Motion to Vacate a Sentence under Title 28 U.S.C. §2255.[2]

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[1] Title 18 U.S.C. §924(c) provides, where relevant here:

> Whoever, during and in relation to any crime of violence or drug trafficking crime * * * for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years * * *.

[2] In light of the nature of the Petitioner's challenge and the nature of the relief he requests, on July 6, 1994, we issued a

III. Discussion

The Petitioner does not challenge the propriety of the 78-month sentence that was entered upon his plea of guilty to the possession with intent charge. Rather, the Petitioner confines his challenge to the consecutive 60-month sentence that resulted from his plea of guilty to

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Report and Recommendation that the Petition be considered as a Section 2255 proceeding, and be reassigned from District Judge Michael J. Davis, to Chief Judge Diana E. Murphy, who had imposed the Petitioner's sentence. See, *Title 28 U.S.C. §2255* (prisoner claiming that sentence is subject to collateral attack may move the Court "Which imposed the sentence to vacate, set aside or correct the sentence"). On July 25, 1994, our Report and Recommendation was adopted by the District Court. Accordingly, we examine the Petitioner's claims in the context of Section 2255.

In support of such an examination, we would further note that Section 2255 has long been interpreted as providing a remedy "as broad as habeas corpus," with its purpose "to afford the same rights as in habeas corpus, but with jurisdiction confined to the sentencing court." *Barkan v. United States*, 341 F.2d 95, 96 (10th Cir. 1965), cert. denied, 381 U.S. 940 (1965). A Writ of Habeas Corpus under Section 2241 "is not an additional, alternative, or supplemental remedy to the relief afforded by motion in the sentencing court under Section 2255" but, rather, the Section 2255 remedy "supplants that of habeas corpus and is exclusive unless it is shown that it is inadequate or ineffective to test the legality of the prisoner's detention." *Id.* at 95-96; see also, *Hill v. United States*, 368 U.S. 424, 427 (1962) (section 2255 remedy "exactly commensurate with that which had previously been available by habeas corpus in the court of the district where the Petitioner was confined"); cf., *United States v. Hayman*, 342 U.S. 205, 219 (1952) ("nowhere in the [legislative] history of Section 2255 do we find any purpose to impinge upon prisoners' rights of collateral attack upon their convictions"); *United States v. Giddings*, 740 F.2d 770, 774 (9th Cir. 1984).

the charges of Count II. In this respect, the Petitioner claims that the Sentencing Court accepted his guilty plea without establishing a factual basis for that plea, in violation of Rule 11(f), Federal Rules of Criminal Procedure. Specifically, the Petitioner asserts that "the plea allocution proffered by the petitioner was insufficient, since it did not indicate [a] connection between the firearms in the bedroom of the house, and the garage, where the drug trafficking occurred." *Petition Attachment*, at 5.

A. *Standard of Review.* Rule 11(f), Federal Rules of Criminal Procedure, provides as follows:

> Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

For the purposes of Rule 11(f), "a factual basis for a plea of guilty is established when the court determines there is sufficient evidence at the time of the plea upon which the court may reasonably determine that the defendant likely committed the offense." *United States v. Marks*, 38 F.3d 1009, 1012 (8th Cir. 1994); *Gregory v. Solem*, 774 F.2d 309, 312 (8th Cir. 1985), cert. denied, 475 U.S. 1088 (1986). The Rule requires the Sentencing Court to establish "that the conduct which the defendant admits constitutes the offense charged and that the Government has evidence from which a reasonable juror could conclude that the defendant was guilty as charged." *United States v. Ford*, 993 F.2d 249, 253 (D.C. Cir. 1993), citing *Notes of Advisory*

Committee, Rule 11(f), Federal Rules of Criminal Procedure, 1966 Amendment.[3]

B. *Legal Analysis.* In determining whether the Sentencing Court complied with the requisites of Rule 11(f), we must consider the nature and elements of the offense upon which the Petitioner entered his plea of guilty. In order to establish guilt, Title 18 U.S.C. §924(c) requires proof of the following two separate elements:

> First, the prosecution must demonstrate that the defendant used or carried a firearm. Second, it must prove that the use or carrying was during and in relation to a drug trafficking crime.

United States v. Simms, 18 F.3d 588, 592 (8th Cir. 1994), quoting, *Smith v. United States*, ___ U.S. ___, 113 S.Ct. 2050, 2053 (1993). With these elements of proof in mind, we note that, at the commencement of the Change of Plea Hearing, the Court accepted a plea agreement, that the Petitioner had signed and that detailed the sentencing stipulations. *Petitioner's Exhibit B. Transcript to Hearing of June 15, 1990* ("Hearing Transcript"), at 2; *Government's Exhibit A, Plea Agreement and Sentencing Stipulations.* Those agreed upon stipulations included the following factual basis for the petitioner's plea:

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[3] In fact, as long as there is a strong factual basis supporting a guilty plea, it is valid even if it is accompanied by claims of innocence – a so-called "*Alford* plea." See, *North Carolina v. Alford*, 400 U.S. 25 (1970); *White v. United States*, 858 F.2d 416, 423 (8th Cir. 1988), cert. denied, 489 U.S. 1029 (1989), citing *White Hawk v. Solem*, 693 F.2d 825, 829 (8th Cir. 1982), cert. denied, 460 U.S. 1054 (1983).

> The parties also agree that, on or about March 19, 1990 * * * the defendant knowingly used firearms during and in relation to a drug-trafficking offense, namely the offense of possession with the intent to distribute methamphetamine. The following firearms were found in the [Petitioner]'s bedroom near the 6.9 grams of methamphetamine: a loaded Walther PBK .380 caliber handgun, serial number A016494; and a loaded .22 caliber Advantage Arms 4-shot revolver. The [Petitioner] admits ownership and possession of these two guns.

The Court also heard the Petitioner's sworn admission that he had been in possession of the 6.9 grams of methamphetamine that had been seized from his bedroom, and the 33 grams that had been uncovered in a coffee can in his garage. *Transcript*, at 12. He also testified that he planned on selling the methamphetamine that was contained in the coffee can. *Id.* Further, he admitted to having been in possession of the two firearms that had been seized from his bedroom, to the fact that the guns were found in close proximity to the methamphetamine, and to the fact that one of the guns had been loaded with ammunition. *Id.* at 14, 16. He also unqualifiedly acknowledged that seven pounds of methamphetamine, as well as three additional weapons, had been found in the garage upon the execution of the Search Warrant on March 19, 1990. *Id.* at 14-15.

Although the Petitioner denied that he had ever sold methamphetamine out of his house, he admitted that, in the past, he had trafficked that substance in his garage. *Transcript*, at 15. He denied that he kept the guns in his

bedroom in order to assist in a drug deal, but acknowledged that the guns "were there for protection." *Id.* In addition, he admitted that these same weapons "were available" if he had ever needed a firearm during his previous sales of illicit drugs. *Id.* Nevertheless, he maintained that "they weren't right out in the open, you know, I couldn't just reach over and grab it." *Id.* at 16.[4]

Based upon our thorough review of the Record before the Sentencing Court, as well as the Transcript of the Hearing at which the plea of guilty plea to Count II was accepted, we are satisfied that the Sentencing Court had an adequate factual basis for the plea, as is required by Rule 11(f). Generally, to be used "in relation to" a drug trafficking offense, the "firearm must have some purpose or effect with respect to the drug trafficking, offense," and must at least "facilitate, or have the potential of facilitating, the drug trafficking offense." *Smith v. United States*, supra at 2059; *United States v. Hughes*, 15 F.3d 798, 803 (8th Cir. 1994); *United States v. Mejia*, 8 F.3d 3, 5 (8th Cir. 1993).

It is also well-settled in this Circuit that, in order to show that the Petitioner "used" the firearms in relation to

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[4] Also before the Court were the Receipt, Inventory and Return that had been completed by the officers who executed the Search Warrant at the Petitioner's residence on March 19, 1990. These documents corroborated his admissions by confirming that small baggies, which contained suspected methamphetamine, had been seized from a coffee can in his garage and in his master bedroom, and that two firearms – a Walther PBK.380 caliber handgun and a .22 caliber Advantage Arms 4-shot revolver – had been located in the same master bedroom. *Petitioner's Exhibit D.*

his drug-trafficking activities, the Government need not prove that he was in actual possession of the firearm, or that he brandished or discharged it. *United States v. Newton*, 31 F.3d 611, 613 (8th Cir. 1994); *United States v. Wolfe*, 18 F.3d 634, 637 (8th Cir. 1994). Instead, the Jury need only find a sufficient nexus between the gun and the drug trafficking crime. *United States v. Simms*, supra at 592, citing *United States v. Watson*, 953 F.2d 406, 409 (8th Cir. 1992). Where, as here, the weapon was in close proximity to the drugs and was readily accessible, the evidence is sufficient to support a Section 924(c) conviction. See, *United States v. Horne*, 4 F.3d 579, 587 (8th Cir. 1994) (use of weapon includes "presence and ready availability" of firearm at residence), *cert. denied*, 114 S.Ct. 1121 (1994); *United States v. Jones*, 23 F.3d 1407, 1409 (8th Cir. 1994); *United States v. Townsley*, 929 F.2d 365, 368 (8th Cir. 1991).

The Petitioner complains that the guns were kept in his bedroom, and that his drug trafficking occurred in his garage, which was a "totally separate building." *Memorandum*, at 3. However, to establish the necessary nexus between the gun and the drug trafficking crime, "the gun need not 'be located in the room where the drug transaction occurs.' " *United States v. Simms*, supra at 592, quoting *United States v. Horne*, supra at 587. Instead, the controlling factor is whether the placement of the weapons supports their ready accessibility if needed in an emergency. See, *United States v. Boykin*, 986 F.2d 270, 274 (8th Cir. 1993), cert. denied, 114 S.Ct. 241 (1994), citing *United States v. Lyman*, 892 F.2d 751, 754 n. 4 (8th Cir. 1989), cert. denied, 498 U.S. 810 (1990).

In applying these precepts, we reject the Petitioner's suggestion that his garage and bedroom – which he

alleges to be about 50 feet apart – were too far distant to allow the necessary nexus which was an essential feature of his plea agreement. While the Petitioner has claimed that the guns were kept hidden in his bedroom principally to facilitate his girlfriend's protection, we find his other admissions at the Hearing of June 15, 1990, to the contrary. For instance, he testified that these weapons were available to him during his drug trafficking activities at his residence, if and when they were needed. Compare, *United States v. Boucher*, 909 F.2d 1170, 1175 (8th Cir. 1990), cert. denied, 498 U.S. 942 (1990). As a consequence, even if we account for the Petitioner's admitted ambulatory limitations – owing to his artificial leg – the firearms he stored in his bedroom served the purpose of assuring his safety, and the security of his premises, during the conduct of his illegal drug-related activities. This is the same bedroom as to which the petitioner admitted to have stored 6.9 grams of methamphetamine. Accordingly, this evidence is wholly sufficient to establish the close proximity and the ready accessibility, which is needed to support a Section 924(c) conviction. *United States of America v. Rockelman*, No. 94-2222, Slip Op. at 8 (8th Cir. March 1, 1995); *United States v. Horne*, supra at 587; *United States v. Jones*, supra at 1409; *United States v. Townsley*, supra at 368. Thus, the Petitioner admitted to the Sentencing Court that he maintained weapons at his residence, which facilitated his drug transactions.

As his plea agreement makes clear, the petition admitted his ownership of the two weapons that had been seized in his bedroom, and these weapons formed the basis of his voluntary plea of guilty to the Section

924(c) charges. Therefore, because the Petitioner's testimony before the sentencing Court established a proper factual basis for his plea, and "[b]ecause the plea agreement's description of the essential facts underlying the charges supports a finding of guilt, we hold that [the Petitioner]'s acknowledgement of the accuracy of the plea agreement's provisions satisfies Rule 11's requirement that the court establish a factual basis for the defendant's guilt." *United States v. Abdullah*, 947 F.2d 306, 309 (8th Cir. 1991), cert. denied, 112 S.Ct. 1969 (1992).

WHEREFORE, It is –

RECOMMENDED:

That the Petition for a Writ of Habeas Corpus be dismissed.

/s/ Raymond L. Erickson
Raymond L. Erickson
UNITED STATES
MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIFTH DIVISION
Civil No. 5-94-87

Kenneth Eugene Bousley,
Reg. No. 04450-041,

Petitioner,

v.

Joseph M. Brooks,
Warden,

ORDER

(Filed May 22, 1995)

This matter is before the court upon petitioner's objections to a Report and Recommendation of United States Magistrate Judge Raymond L. Erickson dated March 14, 1995. Petitioner objects to the magistrate judge's recommendation that his Petition for a Writ of Habeas Corpus be dismissed.

Based upon a de novo review of the record herein, the court adopts Magistrate Judge Erickson's Report and Recommendation dated March 14, 1995. Accordingly, **IT IS HEREBY ORDERED** that the Petition for a Writ of Habeas Corpus is dismissed.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: May 18, 1995

/s/ David S. Doty
David S. Doty, Judge
United States
District Court

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

KENNETH EUGENE BOUSELY
Reg. No. 04450-041 **Case No. Civ. 5-94-97**

v. **JUDGMENT IN A CIVIL CASE**

JOSEPH M. BROOKS, WARDEN

( ) **July Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

(X) **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that the Petition for a Writ of Habeas Corpus shall be, and hereby is, dismissed.

DATED: May 22, 1995

FRANCIS E. DOSAL, CLERK
By /s/ Susan E. Anderson
Susan Anderson,
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-2687

Kenneth Eugene Bousley, Appellant, v. Joseph M. Brooks, Warden, Appellee.	•	Appeal from the United States District Court for the District of Minnesota.

Submitted: July 26, 1996

Filed: October 3, 1996

Before BOWMAN, BEAM, and LOKEN, Circuit Judges.

BEAM, Circuit Judge.

Kenneth E. Bousley was convicted in 1990, upon a plea of guilty, for drug trafficking and use of a firearm in relation to a drug offense. He now appeals from the district court's[1] dismissal of his 28 U.S.C. § 2255 habeas corpus petition. We affirm.

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[1] The Honorable David S. Doty, United States District Judge for the District of Minnesota, adopting the recommendations of the Honorable Raymond L. Erickson, United States Magistrate Judge for the District of Minnesota.

I. BACKGROUND

On March 19, 1990, police officers executed a search warrant at Bousley's home in Minneapolis, Minnesota. The officers found two coolers in Bousley's garage. Inside the coolers were two briefcases containing approximately seven pounds (3,153 grams) of methamphetamine. One of the coolers also contained two loaded handguns and one unloaded handgun. A coffee can in the garage contained an additional 33 grams of methamphetamine. The officers found another 6.9 grams of methamphetamine and two loaded handguns in Bousley's bedroom.

Bousley was charged with possession of methamphetamine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1), and with use of a firearm in relation to a drug offense pursuant to 28 U.S.C. § 924(c). Bousley admitted that he had been selling methamphetamine from his garage. He also admitted knowledge of the drugs and firearms in his bedroom, as well as of the drugs found in the coffee can in the garage. Bousley disclaimed knowledge of the drugs and firearms found inside the two coolers.

Bousley entered a plea of guilty to both the drug and firearms charges. The plea agreement stipulated that Bousley could challenge the amount of drugs that would be used to determine his sentence. In accordance with this agreement, the district court held an evidentiary hearing at which it received exhibits and took testimony from Bousley and FBI Special Agent Michael Kelly, who had interviewed Bousley after his arrest. Based on the hearing and on Bousley's presentence report, the district court determined that Bousley's sentence for the drug

charge would be based on the 946.9 grams of methamphetamine found in Bousley's bedroom, in the coffee can, and in one of the two briefcases in the garage. The court decided not to consider the approximately five pounds of drugs found in the second briefcase in determining the relevant conduct for which Bousley was accountable. The court sentenced Bousley to a term of seventy-eight months for the section 841(a)(1) drug charge and to a consecutive mandatory sixty-month sentence under § 924(c) for use of the firearms in relation to the drug offense.

Bousley appealed his sentence under the drug charge. This court affirmed. *United States v. Bousley*, No. 90-5598 (8th Cir. Sept. 25, 1991). Bousley then brought this habeas corpus action pursuant to 28 U.S.C. § 2255. Bousley claims: (1) that his plea of guilty to the section 924(c) firearms charge is not supported by an adequate factual basis; and (2) that section 924(c) is unconstitutionally vague. The district court dismissed the petition and Bousley appeals. After Bousley filed his appeal, the United States Supreme Court clarified the scope of section 924(c) in *Bailey v. United States*, 116 S. Ct. 501 (1995). Bousley then supplemented his brief, arguing that *Bailey* requires us to set aside his guilty plea.

II. DISCUSSION

We review the district court's dismissal of Bousley's section 2255 petition de novo. *Holloway v. United States*, 960 F.2d 1348, 1351 (8th Cir. 1992). In the proceedings below, the government argued that Bousley waived his right to challenge his conviction in a collateral action

because he failed to preserve this issue in his prior appeal. While the district court considered the merits of Bousley's claims in dismissing the petition, we find the waiver issue dispositive.

A. Waiver

A petitioner who fails to raise an issue on direct appeal is thereafter barred from raising that issue for the first time in a section 2255 habeas corpus proceeding. *Reid v. United States*, 976 F.2d 446, 447 (8th Cir. 1992), *cert. denied*, 507 U.S. 945 (1993) (citing *United States v. Frady*, 456 U.S. 152, 165 (1982)). Such a waiver applies to convictions pursuant to plea agreements as well as to those rendered after trial. *See id.* at 448 (defendant convicted of section 924(c) violation after nolo contendere plea pursuant to a plea agreement is barred from challenging conviction in section 2255 action). A petitioner is excused from a procedural default only if he can show both (1) a cause that excuses the default, and (2) actual prejudice from the errors that are asserted. *Id.*

In his prior appeal, Bousley challenged only the propriety of the sentence imposed for his possession of methamphetamine. *Bousley*, No. 90-5598, slip op. at 1. Bousley did not appeal the adequacy of the factual basis of his guilty plea, nor did he argue that section 924(c) is unconstitutionally vague. Absent a showing of cause and prejudice, Bousley may not now bring these claims through collateral attack.

Bousley argues that he is not barred from collaterally challenging his conviction, despite his default, because of the Supreme Court's ruling in *Bailey*. In *Bailey*, the Court

held that "use" of a firearm under section 924(c) requires a showing of "active employment" of the firearm, a more stringent standard than this Circuit had previously applied. *Bailey*, 116 U.S. at 505. Bousley argues that because neither he nor his counsel could have foreseen the decision in *Bailey*, he has not waived a challenge to his conviction.

We disagree. This court recently held in *United States v. McKinney*, 79 F.3d 105, 109 (8th Cir. 1996), that *Bailey* does not resurrect a challenge to a section 924(c) conviction that has been procedurally defaulted.[2] The defendant in *McKinney* had been convicted after trial, rather than, as here, upon a guilty plea. *Id.* at 107. However, Bousley's plea cannot excuse his procedural default. Indeed, a defendant who enters a guilty plea with no conditions as to guilt "waives all challenges to the prosecution of his or her case except for those related to jurisdiction." *United States v. Jennings*, 12 F.3d 836, 839 (8th Cir. 1994) (citing

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[2] In urging that "*Bailey* should be held retroactively applicable to [his section] 2255 motion," Bousley claims that *McKinney* "is alone in denying relief under *Bailey* to appellants with pending cases . . . and would set this court alone against all other courts that have addressed the issue." Supplemental Brief of Appellant at 3, 5. As an initial matter, a panel of this court is not free to disregard another panel decision. *Smith v. Copeland*, 87 F.3d 265, 269 (8th Cir. 1996). Even were we able to do so, Bousley's assertion is groundless. The retroactive effect of *Bailey* is a distinct issue from whether a defendant has waived the right to collateral review by failing to preserve an issue on appeal. This court has not hesitated to remand section 924(c) convictions for reconsideration in light of *Bailey* when the defendant preserved the issue by properly challenging the conviction on direct appeal. *See, e.g., United States v. Webster*, 84 F.3d 1056, 1066-68 (8th Cir. 1996).

Smith v. United States, 876 F.2d 655, 657 (8th Cir.), *cert. denied*, 493 U.S. 869 (1989)). Collateral review of a guilty plea is therefore "ordinarily confined to whether the underlying plea was both counseled and voluntary." *United States v. Broce*, 488 U.S. 563, 569 (1989).

As this case illustrates, a plea agreement is a process of negotiation and concession. Bousley pleaded guilty, but was afforded by stipulation in the plea agreement the opportunity to contest the amount of methamphetamine for which he would be held accountable. This concession allowed the district court to determine that it would not consider for sentencing purposes five pounds of the drugs found in Bousley's garage. We will not allow this process to be undone years after the fact, nor does Bousley cite any authority that compels us to upset the finality of such a plea agreement.[3] We are therefore convinced that procedural default and waiver apply to those convictions that follow a guilty plea no less than to those that follow a trial.[4]

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[3] Bousley argues that *Davis v. United States*, 417 U.S. 333 (1974), compels us to reopen his plea. As counsel conceded at oral argument, however, *Davis* involved a conviction after a trial and a direct appeal in which the petitioner presented the same issue raised later in his section 2255 action. This is a far cry from a collateral attack of a conviction resulting from a plea agreement.

[4] We acknowledge that the Tenth Circuit in *United States v. Barnhardt*, 93 F.3d 706 (10th Cir. 1996) permitted a collateral attack on a section 924(c) conviction following a guilty plea. For the reasons discussed in the text, however, we decline to follow our sister circuit on this point.

As the district court noted, the record shows that Bousley acknowledged ownership of at least some of the methamphetamine and firearms found in his garage and bedroom and admitted selling drugs from his garage. Before accepting Bousley's plea, the sentencing court meticulously advised Bousley of his rights to counsel and to a jury trial, explained that he would be subject to mandatory minimum sentences, and inquired whether Bousley had been threatened or pressured to plead guilty. The court also advised Bousley that a guilty plea would foreclose an appeal of his conviction, and Bousley indicated that he understood this. Bousley was fully advised of his rights and understood that he was waiving those rights by pleading guilty. Because there is no indication that Bousley's plea was involuntary or uninformed, he has waived the right to collateral review of his conviction unless he can show cause for his procedural default and resulting prejudice. *Ford v. United States*, 983 F.2d 897, 898 (8th Cir. 1993).

B. Cause and Prejudice

Bousley's only argument to excuse his default is that he received ineffective assistance of counsel during his plea and sentencing. *See United States v. Ward*, 55 F.3d 412, 413 (8th Cir. 1995) (citing *Frady*, 456 U.S. at 167-68) (ineffective assistance of counsel may constitute "cause" to excuse procedural default in a section 2255 action). Specifically, Bousley claims that his counsel failed to pursue a viable defense, was "prosecutorial" in examining him during his sentencing, refused to research existing law, and refused to honor Bousley's request to appeal his conviction under section 924(c).

We have carefully examined the record and find Bousley's arguments to be without merit. To be constitutionally deficient, counsel's performance must fall "below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). In examining whether an attorney failed to meet this standard, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689.

Other than the generalized assertions noted above, Bousley points to no instances in which counsel failed to adequately represent him, much less that his counsel's actions fell below the constitutional minimum *Strickland* requires. Bousley's counsel did recommend that Bousley not pursue an appeal of his section 924(c) conviction, but that recommendation was not unreasonable given counsel's understanding of this court's interpretation of section 924(c) before *Bailey*. In any event, counsel fully explained his reasons for declining to appeal the conviction to Bousley, and advised Bousley that he should seek other counsel if he was determined to press that issue on appeal. These actions do not rise to a constitutionally deficient level of unreasonableness.

Because Bousley has not shown that his counsel's representation fell below an objective standard of reasonableness, he has failed to establish that he received ineffective assistance from counsel. We therefore find no cause for Bousley's procedural default, and need not examine the "prejudice" element of Bousley's claim. Bousley has waived his right to collateral review of his section 924(c) conviction by pleading guilty and by failing to challenge the conviction on direct appeal.

III. CONCLUSION

For the foregoing reasons, we affirm the district court's dismissal of Bousley's petition.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-2687MND

Kenneth Eugene Bousley, Appellant, v. Joseph M. Brooks, Warden, Appellee.	*	Appeal from the United States District Court for the District of Minnesota

JUDGMENT

(Filed Jan. 06, 1997)

This appeal from the United States District court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

October 3, 1996

A true copy.

ATTEST: /s/ Michael E. Gans
CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

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(5)

No. 96-8516

In The

Supreme Court of the United States

October Term, 1997

KENNETH E. BOUSLEY,

Petitioner,

vs.

JOSEPH M. BROOKS, WARDEN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Does this Court's decision in *Bailey v. United States*, apply retroactively, so that a defendant who pled guilty to a charge of using a firearm in violation of 18 U.S.C. § 924(c) is entitled to collateral relief upon proof that he was not told that the facts of his case do not amount to "use" under § 924(c)?

2. Does a guilty plea waive the defendant's right to attack his conviction, where a subsequent change in the law makes the facts upon which the plea was based non-criminal?

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OPINION BELOW

The opinion of the Court of Appeals is reported at 97 F.2d 384 (1996) and reproduced in the Appendix. The unreported Order of the District Court in No. 5-94-87, May 18, 1995, from which the appeal was taken and the Report and Recommendation which it adopted without change, are reproduced in the Appendix.

JURISDICTION

The final judgment of the Court of Appeals for the Eighth Circuit was entered December 18, 1996 when that court denied Petitioner's timely petition for rehearing from its October 3, 1996 ruling.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Amendments to the United States Constitution.

Amendment V

No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . .

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district

> wherein the crime shall have been committed, . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

This case also involves the following statutes:

18 U.S.C. § 924(c)(1)

[W]hoever, during and in relation to any . . . drug trafficking crime, . . . uses or carries a firearm is subject to imprisonment for five years.

28 U.S.C. § 2255

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

. . . .

If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that

there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

STATEMENT

On the afternoon of March 19, 1990, police officers entered Petitioner Kenneth E. Bousley's house through the unlocked kitchen door to execute a search warrant. Presentence Investigation Report ("PSI") para 17, JA 37. Police had obtained the warrant based on information supplied by a confidential informant about methamphetamine trafficking at that location, and about a purchase that the informant had made there one or two days earlier, PSI para 6-8, JA 34. There was no mention of firearms in any of the information supplied by the informant, PSI para 6-9, JA 34-35; Habeas Petition, Ex. D.

The officers arrested Bousley, who was watching television in the bedroom. Bousley told the officers where to find two small bags of methamphetamine in the bedroom, and a coffee can in the garage which contained more methamphetamine. He also told the officers about two pistols that were stored in the bedroom, one in the headboard of the bed, and another inside a closed, zippered vinyl bag in the cabinet next to the bed, PSI para 8-9, 17 JA 34-35, 37.

Bousley gave the officers keys to the garage, where officers found the coffee can and two coolers, each with a

briefcase containing a substantial amount of methamphetamine, PSI para 7-8, JA 34. One of the coolers also contained two loaded handguns and one unloaded handgun.

Bousley was initially charged with possession of methamphetamine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1). A superceding indictment added the charge that Bousley "knowingly and intentionally used the following firearms during and in relation to a drug trafficking crime. . . . in violation of Title 18 United States Code, Section 924(c)," JA 5. Bousley was not charged with "carrying" a firearm.

Section 924(c)(1) mandates an additional term of imprisonment for one who uses or carries a firearm "during and in relation to any crime of violence or drug trafficking crime . . . for which he may be prosecuted in a court of the United States." As defined in section 924(c)(2), a "drug trafficking crime" includes any felony punishable under the Controlled Substances Act, 21 U.S.C. § 801, et seq.

Bousley entered an agreement to plead guilty to both the drug and the firearm charges, JA 7. At the change of plea hearing, the trial judge asked if Bousley understood what he was charged with under Count II, the § 924(c) charge. The following colloquy then occurred:

> DEFENDANT BOUSLEY: Possession of a firearm.
>
> THE COURT: Okay. Now, it also charges you with possessing the firearms during, in, and in relation to a drug trafficking crime, the type of crime that was referred to in Count I. Would you tell me what kind of weapons you had at the time in question?
>
> . . . .
>
> MR. PAULSEN [Assistant U.S. Attorney]: Are you satisfied, Mr. Peterson [Bousley's counsel], that there's a factual basis?
>
> MR. PETERSON: I'm satisfied under the state of the law in this Circuit that there is a factual basis for Count II [the § 924(c) charge]. Hearing Tr. 13, 15, JA 25, 27.

The pre-sentence report noted that two pistols had been "found in the defendant's bedroom near the 6.9 grams of methamphetamine," and that "Three other firearms were found in the two briefcases containing the bulk of the methamphetamine," PSI para 8, JA 34.

The PSI also recited a written statement Bousley had supplied, which included the following:

> 15. "Offense – Possession of firearms.
>
> 16. "Explanation For Possession – I had the guns for when I wasn't home so Jessie [Bousley's live-in girlfriend] had protection because she had been raped and we didn't want something like that to happen again because the guy was never caught." PSI para 15-16, JA 37.

The trial court adopted these statements in its Finding of Facts, as part of its Sentencing Memorandum. JA 90.

In accordance with the plea agreement, the district court held an evidentiary hearing to determine the amount of methamphetamine for which Bousley should

be held accountable for sentencing purposes. Plea Agreement 5, JA 8-10. Bousley had denied knowledge of the contents of the coolers, and following the hearing, the trial court rejected the government's position, and found Bousley accountable for but two of the seven pounds of methamphetamine found in the coolers and the bedroom. Findings of Fact 3-4, JA 78-80.

The court sentenced Bousley to a term of seventy-eight months for the section 841(a)(1) drug charge and to the consecutive mandatory sixty-month sentence under § 924(c). Judgment 2, JA 82-84. He has now completed his entire sentence on the drug charge.[1]

Bousley, represented by the same attorney who had represented him before the district court, unsuccessfully appealed his § 841(a)(1) conviction (*United States v. Bousley*, 950 F.2d 727 (CA8 1991) (table). Not surprisingly, his attorney refused to raise any issues relating to the § 924(c) count in the appeal. Instead, counsel sent Bousley two letters explaining his reasoning and citing *United States v. Brett*, 872 F.2d 1365, 1370-71 (CA8), *cert. denied* 110 S. Ct. 322 (1989), and *United States v. Matra*, 831 F.2d 837, 843 (CA8 1988) for the proposition, which was well settled in the Eighth Circuit until *Bailey v. United States*,

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[1] Bousley had completed the 78 month sentence by June of 1996. As of November 6, 1997, he had finished an amount equivalent to the 2-level enhancement which would have been imposed on Count I for possession of firearms under the Sentencing Guidelines. In view of the § 924(c) charge, enhancement was not imposed to avoid double counting firearms possession. PSI para 24, JA 40. Even if the firearms enhancement were to be added on resentencing, therefore, Bousley has completed his sentence on Count I.

116 S. Ct. 501 (1995), that the mere presence and ready availability of a firearm at a location where drug dealing takes place constitutes "use" of a gun under § 924(c). Pet. Reply to Mot. Dismiss, JA 135-141.

On July 5, 1994, Petitioner filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241, which was treated by the district court as a motion to vacate sentence under 28 U.S.C. § 2255. JA 104, 115-117. In his Petition, Bousley alleged that there was insufficient evidence to support his conviction under § 924(c), that his plea of guilty to the § 924(c)charge was not supported by an adequate factual basis, and that § 924(c) is unconstitutionally vague. JA 105-109.

Bousley's habeas petition pointed out that at the hearing on his change of plea, the trial judge told him that he was charged with "possessing firearms during, in, and relation to a drug trafficking crime. . . . " Change of Plea Tr. at 13, JA 25. The full transcript of those proceedings was attached as Exhibit B to the habeas petition. Bousley also included his trial counsel's letters about § 924(c) in his Reply to the government's motion to dismiss. JA 135-143.

The government filed a motion to dismiss, asserting that Bousley had waived his right to challenge the factual basis for his plea by failing to raise it on appeal, and contending in any event that a sufficient factual basis for the plea was shown. JA 120 et seq. Among the cases the government's brief relied upon were the same ones Bousley's counsel had cited to him, *United States v. Brett*, 872 F.2d 1365 (CA8 1989) and *United States v. Matra*, 831

F.2d 837 (CA8 1988). Memorandum In Support of Motion to Dismiss 4, JA 124-126.

The Magistrate Judge recommended summary dismissal of the habeas petition. Among its findings were the following:

> It is also well-settled in this Circuit that, in order to show that the Petitioner "used" the firearms in relation to his drug-trafficking activities, the Government need not prove that he was in actual possession of the firearm, or that he brandished or discharged it. [citations omitted.] Instead the Jury need only find a sufficient nexus between the gun and the drug trafficking crime. Report and Recommendation 8. JA 150-151.

The district court adopted the magistrate judge's Report without change on May 18, 1995, JA 154, and Petitioner appealed *pro se* to the Eighth Circuit.

On December 6, 1995, this Court decided *Bailey v. United States*, 116 S. Ct. 501 (1995), holding that a violation of § 924(c)(1) "requires evidence sufficient to show an active employment of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense." 116 S. Ct. 501, 505. "Active employment," this Court specified, "certainly includes brandishing, displaying, bartering, striking with, and most obviously, firing or attempting to fire, a firearm." *Id.* at 508. However,

> [a] defendant cannot be charged under § 924(c)(1) merely for storing a weapon near drugs or drug proceeds. Storage of a firearm, without its more active employment, is not reasonably distinguishable from possession. *Id.*

Bailey thus represented a major departure from prior case law interpreting § 924(c) in the Eighth Circuit and in other circuits, all of which had interpreted "use" to include the mere "presence and availability" of a firearm in relation to a drug trafficking offense. Compare *United States v. Brett*, 872 F.2d 1365 (CA8 1989) and *United States v. Horne*, 4 F.3d 579, 587 (CA8 1994) with *Bailey*, 116 S. Ct. 501, 508.

Subsequently, the circuit court appointed present counsel to represent Bousley, who filed supplemental briefing arguing that *Bailey* required reversal of the district court ruling. Appellant's Supplemental Brief 1-2. The circuit court affirmed the district court in a published opinion, *United States v. Bousley*, 97 F.3d 284 (CA8 1996), which found that Bousley had "waived" his right to attack his guilty plea. JA 159. The court of appeals held:

> The [district] court also advised Bousley that a guilty plea would foreclose an appeal of his conviction, and Bousley indicated that he understood this. Bousley was fully advised of his rights and understood that he was waiving those rights by pleading guilty. Because there is no indication that Bousley's plea was involuntary or uninformed, he has waived the right to collateral review of his conviction. 97 F.3d at 288, JA 162.

The circuit court acknowledged that its holding was directly contrary to *United States v. Barnhardt*, 93 F.3d 706 (CA10 1996). 97 F.3d at 288, JA 161 n.4. Bousley's petition for rehearing was denied on December 18, 1996.

The Petition for a Writ of Certiorari was filed on March 18, 1997. The Government filed a Brief ("US Brief") stating that Bousley's claims had been correctly "procedurally defaulted," and concluding, without explanation, that Bousley had "not demonstrated cause for his procedural default." However, the government did confess error on the part of the circuit court:

> The court of appeals erred by failing to consider whether petitioner had made a sufficient showing of actual innocence to warrant reaching the merits of his constitutional claim, notwithstanding his failure to show and [sic] cause and prejudice. US Brief 9-10.

The Government's brief suggested that the petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded "for further proceedings to determine whether petitioner should be excused from his inability to show cause and prejudice for his failure to advance his constitutional claim on direct review." US Brief 12. This Court instead granted Certiorari on September 29, 1997.

SUMMARY OF ARGUMENT

Petitioner's plea of guilty to charges that he "used" a firearm in violation of § 924(c) is invalid, because he was told at his change of plea hearing that he was charged with "possession" of firearms, and the facts show his conduct did not amount to "use," as that term is explained in *Bailey v. United States*, 116 S. Ct. 501 (1995). This materially inaccurate explanation of § 924(c) violated Bousley's Sixth Amendment right to be informed of the

nature of the charges he faced. *See Henderson v. Morgan*, 426 U.S. 637 (1976). He is entitled to relief through habeas corpus, because the fundamental defect that undermines the reliability of his guilty plea is apparent on the record, and because he has not previously had an opportunity to fully litigate this claim, first because the tools necessary to enable him to attack his guilty plea were not available until *Bailey* was decided, long after the judgment in the underlying proceeding was final; and second because the materially inaccurate information about the nature of the charges given him by trial court and his attorney kept him unaware that his rights had been violated until after he commenced these proceedings. *Davis v. United States*, 417 U.S. 333 (1974).

Petitioner's right to assert these claims was not "waived," because neither he nor his counsel was obliged to predict the *Bailey* decision, and the Fifth and Sixth Amendment rights he relies upon are so fundamental that their denial is inconsistent with the rudimentary demands of fair procedure. *Davis*, 417 U.S. at 346-47; *Menna v. New York*, 423 U.S. 61 (1975). Similarly, procedural default should have no application in this case, because it represents Bousley's first opportunity to fully and fairly litigate the denial of these fundamental rights. *See Blackledge v. Perry*, 417 U.S. 21 (1974). But even if these claims are viewed as defaulted, the denial of his right to be informed of the charges he faced and the newness of the *Bailey* decision establish cause for the alleged default, *Reed v. Ross*, 468 U.S. 1 (1984), and Bousley's incarceration for conduct that does not amount to a violation of § 924(c) establishes prejudice. *Sawyer v. Whitley*, 505 U.S. 333 (1992); *see also Schlup v. Delo*, 513 U.S. 298, 319-320 (1995).

Finally, as an independent ground of relief despite a finding of procedural default, Bousley has proved a fundamental miscarriage of justice, because he is incarcerated for conduct that does not violate § 924(c), he asserted his rights a soon as he reasonably could, and he is, in fact, innocent of the charge upon which he is now imprisoned. *See Murray v. Carrier*, 477 U.S. 478 (1986); *Schlup v. Delo*, 513 U.S. 298 (1995).

ARGUMENT

I

THE INTERPRETATION OF § 924(c) ANNOUNCED IN *BAILEY v. UNITED STATES* SHOULD BE APPLIED TO AFFORD PETITIONER COLLATERAL RELIEF FROM HIS GUILTY PLEA

In *Bailey v. United States*, 116 S. Ct. 501 (1995), this Court rejected the argument that Congress intended by its 1984 amendment to § 924(c) to expand the meaning of "use" so as to swallow the "carry" prong of the statute, *Id.* at 507-08. Instead, "use" retains its active employment component, requiring proof of acts such as "brandishing, displaying, bartering, striking with, and most obviously, firing or attempting to fire, a firearm." *Id.* at 508.

Among the acts specifically listed in *Bailey* as *not* triggering § 924(c) are storage of a firearm without active employment, and hiding a gun so it would be ready for an imminent confrontation. Moreover, "[i]f the gun is not disclosed or mentioned by the offender, it is not actively employed, and it is not " 'used,' " *Id.* at 508-09.

In this case, the undisputed evidence adduced on the trial record and in the presentence report shows that Bousley's conduct did not amount to "use" of a firearm under § 924(c), and that his guilty plea to that charge was entered at proceedings where the court told him he was charged with "possessing firearms during, in and in relation to a drug trafficking crime." Change of Plea Tr. 13, JA 25. It is clear, moreover, that Bousley had no means of litigating claims based on the correct interpretation of § 924(c) until after the judgment in the underlying criminal case was final, for this Court did not decide *Bailey* until long after that case was affirmed on appeal. His attorney's advice during the appeal process, that mere presence and ready availability amounted to "use," Pet. Reply to Motion to Dismiss, JA 135-138, simply reflected settled Eighth Circuit holdings which would have rendered pointless an appeal on the grounds asserted in Bousley's present habeas corpus petition.

Bousley has shown that his guilty plea to the § 924(c) charge cannot stand because the proceedings in which it was entered were fundamentally flawed, and that there is substantial evidence of his factual innocence. The question before this Court is whether habeas corpus[2] is available to afford Bousley relief.

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[2] The proceedings in this case have been treated as a motion "to vacate, set aside or correct the sentence" pursuant to 28 U.S.C. § 2255, although Bousley filed under 28 U.S.C. § 2241, Habeas Petition 1, App. ___. Numerous cases have acknowledged that the procedures and remedies available under § 2255 are identical to those afforded by traditional habeas corpus. *See, e.g. United States v. Hayman*, 342 U.S. 205 (1952); *see also United States v. Mackey*, 401 U.S. 667, 682 n. 1 (1971) (opinion concurring and dissenting in part). For simplicity, therefore, this Brief refers to

A. HABEAS CORPUS IS THE PROPER PROCEDURE TO LITIGATE PETITIONER'S CLAIMS OF FACTUAL INNOCENCE AND DENIAL OF HIS RIGHT TO BE INFORMED OF THE NATURE OF THE CHARGES HE FACED

The circuit court's conclusion that Bousley could not use the writ of habeas corpus to establish his factual innocence and to show that he was never properly informed of the charges against him in the underlying criminal case, 97 F.3d at 287, is inconsistent both with the long history of the Great Writ and with recent cases explaining its proper use.

In this case, Bousley was charged with a crime, but the information the court and his counsel gave him about the nature of the accusation was so inaccurate that it caused him to plead guilty when he was, in fact, innocent. In today's world, this is worse than supplying no information at all about the charges, for it is a commonplace that habeas corpus will be available to protect persons who are imprisoned without being told the "nature and cause of the accusation" they face. *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975); *Riverside v. McLaughlin*, 500 U.S. 44 (1991). Bousley, on the other hand, was detained, deprived of accurate information about the reasons for his imprisonment, and never afforded access to the true nature of the charges against him until long after the judgment in his criminal case was final. To fail to afford him relief through a writ of habeas corpus is surely

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the procedure as habeas corpus, encompassing the procedure in all its forms, except where otherwise indicated.

inconsistent with the long history of the writ and the rights it exists to vindicate.

More recent cases also support this argument. In *Davis v. United States*, 417 U.S. 333, 346-47 (1974), for example, this Court held that "law of the case" could not foreclose a federal prisoner's right to prove that his conviction and punishment were for conduct that is not criminal under a new rule of substantive law.

The circuit court opinion refused to apply *Davis*, because before the Ninth Circuit panel announced the new ruling Davis relied upon in his subsequent § 2255 motion, he had unsuccessfully presented his claim on direct appeal after a trial, 97 F.3d 284, 288 n.3, JA 161 n.3. *Davis*, however, does not rest on this ground or even address the issue of procedural default. The circuit court does not explain its conclusion, and no other cases that discuss *Davis* adopt this line of reasoning. This approach irrationally denies relief to prisoners who failed to foresee *Bailey*, and it is wholly unsupported. Not surprisingly, this view has been disclaimed by the government, US Brief 7, 10-11.

Davis is far from the only case illustrating the role of habeas corpus where there is a fundamental defect that renders a prisoner's confinement unlawful. In *Menna v. New York*, 423 U.S. 61, 62 (1975), for example, habeas relief was available to the petitioner because the face of the indictment to which he had pleaded guilty showed that his conviction violated the Double Jeopardy Clause. To the same effect is *Blackledge v. Perry*, 417 U.S. 21 (1974), where a defendant had been charged and convicted in state court with the misdemeanor of assault with a deadly

weapon. When he appealed, pursuant to state procedure, to obtain a trial de novo, he was charged with felony assault. His guilty plea to the more serious charge was not immune to collateral attack, because he was asserting his right not to be haled into court at all. *Id.* at 30-31.

Even cases which deny collateral relief have explained that in circumstances likes Bousley's, habeas relief is proper. For example, *United States v. Broce*, 488 U.S. 563 (1989) specifically reaffirms the holdings of *Menna* and *Blackledge*, explaining that proceedings which are, on their face, constitutionally defective, can be collaterally attacked. 488 U.S. at 576.

Here Bousley, who was told that he was charged with "possession" of a gun, Change of Plea Tr. 13, JA 25, was deprived of his Fifth and Sixth Amendment rights when he was convicted under § 924(c) for acts that did not amount to "use" of a gun. The defects appear on the face of the record, so even though the avenue of direct appeal has been foreclosed, collateral attack should be available to address them.

A defendant's right to be informed of the charges he faces has always been fundamental to Anglo-American notions of due process and justice. *See Henderson v. Morgan*, 426 U.S. 637, 645 (1976). This right is made explicit in the Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . . and to be informed of the nature and cause of the accusation.

The framers of the Constitution realized, moreover, that this right requires a process to vindicate it. And as Hamilton pointed out in The Federalist, No. 84, the writ of habeas corpus has always been viewed as the means of redress for persons accused without proper notice or opportunity to respond:

> The observations of the judicious Blackstone, in reference to the latter, are well worthy of recital: "To bereave a man of life, [says he,] or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole nation; but confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government." And as a remedy for this fatal evil he is everywhere peculiarly emphatical in his encomiums on the habeas corpus act, which in one place he calls "the BULWARK of the British Constitution." Federalist, 84, 6 (Hamilton).

Long before our Constitution was adopted, British subjects were jealous of their right to relief through the Great Writ. Indeed, one of the primary complaints made in the Petition of Right in 1628 was that prisoners were being brought before the justices pursuant to writs of habeas corpus, yet

> no cause was certified, but that they were detained by your Majesty's special command, signified by the lords of your Privy Council, and yet were returned back to several prisons, without being charged with anything to which they might make answer according to the law. From *The Constitution Papers* (Electronic edition) Elec. Text Corp. (1987).

The importance of habeas corpus in our constitution is shown in the Suspension Clause, U.S. Constitution, Art. 1, section 9. And while Congress has enacted statutes which regulate the Great Writ's use and prescribe procedures by which it may be invoked, there is nothing in either the Constitution or the legislation to weaken or eliminate its historical purpose of affording prisoners a means of challenging their confinement when there has been a total miscarriage of justice or a fundamental defect that goes to the heart of due process of law.

Bousley's guilty plea was the result of such a fundamental defect, and his current imprisonment is a complete miscarriage of justice. *Menna v. New York*, 423 U.S. 61 (1975) holds that a plea of guilty does not bar a claim that the defendant's conviction is unconstitutional " 'no matter how validly his factual guilt is established' " if the facts he pled guilty to are subsequently determined not to be criminal. *Id.* at 62. Here, Bousley is entitled to habeas relief, because the acts for which he is now imprisoned did not violate § 924(c), his guilty plea rests on materially inaccurate information about the charges he faced, and he was never before afforded a meaningful opportunity to litigate these claims.

B. BOUSLEY'S CLAIMS ARE PROPERLY RAISED THROUGH HABEAS CORPUS, FOR THEY ESTABLISH FUNDAMENTAL FLAWS IN THE UNDERLYING FEDERAL CRIMINAL PROCEEDINGS WHICH COMPLETELY UNDERMINE HIS JUDGMENT OF CONVICTION AND THE SENTENCE HE IS NOW SERVING

Collateral attack of the kind Bousley now makes on his judgment of conviction is, of course, not a substitute

for an appeal. *See Sunal v. Large*, 332 U.S. 174, 178 (1947). There are claims which must be raised on direct appeal or defaulted, such as erroneous jury instructions, *United States v. Frady*, 456 U.S. 152, 167 (1982) and challenges to jury selection methods, *Davis v. United States*, 411 U.S. 233 (1973). Such claims can be fully addressed within the confines of the trial court record, and do not necessarily implicate the fundamental validity of the proceedings, so it makes sense for them to be raised and litigated on direct appeal. Defendants who fail to raise them at the first appropriate opportunity are defaulted, and must establish cause and prejudice for their failure in order to be heard on the merits of the defaulted claims. *Frady*, 456 U.S. at 167-68.

By contrast, claims which cannot be adequately litigated on direct appeal because they require proof of facts not on the trial record cannot be the subject of procedural default when they are raised in a first collateral proceeding. The Eighth Circuit approach is typical, requiring that claims of a coerced guilty plea and claims of ineffective assistance of counsel ordinarily *not* be raised on direct appeal. *See, e.g., United States v. Young*, 927 F.2d 1060, 1061 (CA8 1991); *United States v. Murphy*, 899 F.2d 714, 716 (CA8 1990); *United States v. Ulland*, 638 F.2d 1150, 1150 (CA8 1981) (per curiam); *United States v. Mims*, 440 F.2d 643, 644 (CA8 1971) (per curiam).

Also appropriate for habeas corpus are claims that arise from violations of fundamental rights, and which appear on the face of the record, so that the reliability of the outcome of the case is in question. The cases discussed at p. 15-16, above, including *Menna v. New York*, 423 U.S. 61 (1975), *Blackledge v. Perry*, 417 U.S. 21 (1974),

Davis v. United States, 417 U.S. 333 (1974) are examples. Procedural default is not at issue in cases of this type, because the defect in the judgment is apparent from the record. To go through the rubric of a procedural default-cause for default-prejudice analysis under these circumstances would be a wasteful exaltation of form over substance, since cause and prejudice are necessarily shown where the proceedings contain the evidence of their own fundamental invalidity. See the discussion at p. 35-36, below.

In determining if Bousley's claim is appropriately raised for the first time on a collateral attack, it is important to distinguish this case from those brought under § 2254 to attack state court judgments. Petitioners attacking state court judgments are presumed to have had access to courts fully competent to adjudicate all of their claims, including those grounded in federal constitutional law. *Sawyer v. Whitley*, 505 U.S. 333 (1992); *see also Schlup v. Delo*, 513 U.S. 298, 319-320 (1995). Most states have extraordinary writ procedures similar to federal habeas corpus that, to some degree at least, permit state court defendants to raise issues that are not cognizable on direct appeal, including claims based on the federal constitution. State courts are entitled to an opportunity to vindicate the rights of criminal defendants originally charged in state court, and to apply their own state procedural and substantive rules, so long as no federal constitutional principles are offended. Moreover, principles of comity require that federal courts pay due deference to state court proceedings. *See, e.g. Murray v. Carrier*, 477 U.S. 478 (1986); *McCleskey v. Zant*, 499 U.S. 467, 491 (1991).

These familiar principles illustrate why procedural default is at issue in virtually all federal court proceedings where a state court criminal judgment is under collateral attack. *See Sawyer*, 505 U.S. at 338-39.

Different considerations apply when a defendant seeks collateral review of federal trial court proceedings, although the fundamental goals of judicial efficiency and repose also obtain. Where the judgment under attack is a federal one, the extraordinary writs, including habeas corpus under § 2241 and § 2255, provide a defendant a first, and often only, opportunity to litigate issues which either could not be addressed on direct appeal, or are so fundamental that they inherently affect the validity of the prior judgment.

Here, Bousley's first real opportunity to show the invalidity of his guilty plea has come in these habeas proceedings, both because he was not aware of the true nature of the § 924(c) charges and because the courts to which he would have turned earlier would have summarily rejected his claims. Habeas corpus, which this Court has recognized as essentially an equitable remedy, *Schlup v. Delo*, 513 U.S. 298, 319 (1995) must not be denied, because no other remedy is available.

C. THE INTERPRETATION OF § 924(c) ANNOUNCED IN *BAILEY* SHOULD BE APPLIED TO ALL OF THE ISSUES IN THIS CASE BECAUSE ANY OTHER RESULT WOULD CONTRAVENE THE INTENT OF CONGRESS

The government has suggested that retroactivity is not at issue in this case, US Brief at 11 n. 6, and the circuit

court acknowledged *Bailey's* applicability, 97 F.3d at 287. However, the court below implicitly applied the pre-*Bailey* interpretation of § 924(c) to all of the issues it faced. As a result, it wrongly rejected Bousley's claim that his guilty plea was involuntary, and found "procedural default" despite the clear violation of Bousley's right to be informed of the nature of the charges he faced. Petitioner respectfully suggests there should be a forthright holding reaffirming *United States v. Johnson*, 457 U.S. 537, 550 (1982) and stating that § 924(c) must be applied without reservation, in accordance with *Bailey*.

The court of appeals' failure to apply *Bailey* is most apparent in its response to Bousley's assertion that his guilty plea was involuntary and that he was factually innocent. The circuit court stated:

> [T]here is no indication that Bousley's plea was involuntary or uninformed. . . . Bousley's counsel did recommend that Bousley not pursue an appeal of his section 924(c) conviction, but that *recommendation was not unreasonable given counsel's understanding of this court's interpretation of section 924(c) before Bailey*. 97 F.3d at 28, JA 162. [emphasis added.]

While this analysis correctly does not fault Bousley's trial counsel for his advice, its conclusion cannot be squared with *Bailey's* interpretation of § 924(c). In particular, Bousley's plea cannot be viewed as "informed," when his attorney and the trial court inaccurately told him that he could be convicted merely for possession of guns in proximity to the drugs in which he trafficked. Ch. of Plea Tr. 13, JA 25. To be sure, trial counsel's actions were reasonable, but that is not the sole, or even the primary

factor determining whether Bousley was correctly informed about the nature of the § 924(c) charges.

Just as a prosecutor's good faith cannot excuse the failure to disclose material exculpatory evidence, *Kyles v. Whitley*, 514 U.S. 419 (1995) (citing *Brady v. Maryland*, 373 U.S. 83 (1963)), the reasonableness of Bousley's trial counsel's actions do not make Bousley's confinement lawful. Instead, the inquiry should be whether the information given to Bousley about the charges accurately reflected § 924(c) after *Bailey*. Similarly, it does not matter that the trial judge acted in good faith when she inaccurately told Bousley he was charged with possession of guns. To find that Bousley's guilty plea was "informed" and "counseled" is to take the insupportable view that Congress intended § 924(c) to have an elastic meaning which changed on December 6, 1995.

Indeed, the appeals court's failure to apply *Bailey* to the voluntariness issue ignores this Court's analysis of legislative intent. *Bailey* teaches that Congress always intended to continue the requirement of active employment of a firearm. 116 S. Ct. 507-509. Thus, Congress must have intended this result from and after 1984, the last time it amended § 924(c). Had Congress intended to change § 924(c) for a while, or to give it a different meaning beginning December 6, 1995, it surely would have said so. To impose a rule that punishes possession of a weapon without active employment until December, 6, 1995 and thereafter punishes only active employment would be judicial legislating of a most invidious sort. *See Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-13 (1994).

The circuit court cites no authority for its failure to apply *Bailey* to these issues, and the government seemingly concedes the error, US Brief at 9. There is no reason to apply § 924(c) inconsistently, as the court of appeals did, by acknowledging *Bailey* and then failing to apply it to the issues in the case. *Bailey* holds that the Government and lower courts were wrong when they secured guilty pleas from defendants who thought they could be convicted under § 924(c) for the mere presence and availability of guns. Consequently, the circuit court's observation that *Bailey*'s retroactive effect is a "distinct issue from whether a defendant has waived the right to collateral review by failing to preserve an issue on appeal," 97 F.3d at 288, is simply beside the point.

All the circuit courts which have considered the effect of the ruling in *Bailey* have concluded that it applies retroactively to cases on direct review. *See United States v. Cruz-Rojas*, 101 F.3d 283 (CA2 1996); *United States v. Mitchell*, 104 F.3d 649 (CA4 1997); *United States v. Andrade*, 83 F.2d 729 (CA5 1996); *United States v. Damico*, 99 F.3d 1431 (CA7 1996); *United States v. Staples*, 85 F.3d 461 (CA9 1996); *United States v. Wacker*, 72 F.3d 1453 (CA10 1995).

Similarly, many cases have also applied *Bailey* to provide relief on collateral review. *See United States v. Barnhardt*, 93 F.3d 706 (CA10 1996); *United States v. Cota-Loaiza*, 936 F. Supp. 751, 753-54 (D. Colo. 1996) (collecting cases holding that *Bailey* applies retroactively); *see also Triestman v. United States*, 124 F.3d 361 (2d Cir. 1997); *Stanback v. United States*, 113 F.3d 651, 654 n.2 (CA7 1997); *United States v. McPhail*, 112 F.3d 197, 199 (CA5 1997); *but see Price v. United States*, 959 F. Supp. 310, 315 (E.D. Va. 1997).

Most of these cases have relied on *Davis v. United States*, 417 U.S. 333, 346 (1974), where this Court held that a petitioner collaterally attacking his conviction should be given the benefit of case law decided after his conviction when the conviction was "for an act that the law does not make criminal." As the discussion at p. 15-16 explains, *Davis* requires the same result here.

When a similar situation arose in the wake of *McNally v. United States*, 483 U.S. 350 (1987) (mail fraud statute does not reach acts done with intent to deprive citizens of "honest government"), numerous cases applied its holding retrospectively. *See, e.g., Lomelo v. United States*, 891 F.2d 1512, 1515 (CA11 1990); *Borre v. United States*, 940 F.2d 215 (CA7 1991); *Callanan v. United States*, 881 F.2d 229 (CA6 1989).

Our research has found no cases which refused to apply *McNally* to judgments that were final before it was announced, although there are several lines of reasoning used to support these outcomes. Some cases have relied on that portion of *Teague v. Lane*, 489 U.S. 288 (1989) which requires retroactive application of decisions that place certain kinds of private conduct " 'beyond the power of the criminal law-making authority to proscribe.' " *Id.* at 307; *see, e.g., Lomelo*, 891 F.2d at 1515. It would seem unnecessary, however, to rely on the *Teague* rationale, both because *Teague* expressly limits itself to changes in constitutional rules of criminal procedure, 489 U.S. at 299, and because the more direct approach of looking to the intent of Congress, as explained above, should control.

While *Teague's* analysis of retrospective application is not directly applicable here, its holding and Justice Harlan's discussion of habeas jurisprudence in *United States v. Mackey*, 401 U.S. 667, 675 (1971) (opinion concurring and dissenting in part) upon which it is based point to the same result Petitioner seeks here. Justice Harlan argued in *Mackey* that new constitutional rules should always be applied retroactively to cases on direct review, but generally not to criminal cases on collateral review. But even Justice Harlan's general rule of non-retroactivity makes an exception where the new rule makes "certain kinds of conduct beyond the power of criminal law-making authority to proscribe." Justice Harlan reasoned that their rulings ought to be available to collaterally attack judgments that had become final before these new rules were adopted. *Mackey*, 401 U.S. 667, 693.

Bousley's situation here is similar, in that he seeks relief from conviction for acts that never were defined as criminal by § 924(c). Thus, although the *Teague* rationale does not directly apply here, the rule Bousley espouses is consistent with the reasoning in that case.

II

BOUSLEY'S GUILTY PLEA COULD NOT WAIVE HIS RIGHT TO BE INFORMED OF THE NATURE OF THE CHARGES HE FACED OR CURE THE FUNDAMENTAL DEFECTS IN THE PROCEEDINGS BY WHICH HE WAS CONVICTED

A. A GUILTY PLEA DOES NOT "WAIVE" FUNDAMENTAL DEFECTS IN PROCEEDINGS WHICH APPEAR ON THE FACE OF THE RECORD

Bousley shows in his Petition for Writ of Habeas Corpus that he was deprived of his right to be informed

of the charges against him in the trial court, and that this deprivation continued right through the appellate process. Change of Plea Tr. 13, JA 25. He also showed that the undisputed facts regarding his arrest tend to establish his factual innocence. PSI, para 6-9, JA 34-35; Habeas Petition Ex. D. The Plea Agreement and the transcript of the change of plea hearing show that Bousley's Sixth Amendment right to be informed of the nature of the charges he faced was violated, because he was told that possession of guns made him guilty of violating § 924(c). JA 25. The testimony at that hearing, JA 25-28, the testimony at the September 26, 1990 hearing on drug quantity accountability, JA 51-76, the trial court's Sentencing Memorandum, JA 90-92, and the Presentence Investigation Report, JA 34-49, all show that Bousley was, in fact, innocent of the § 924(c) charges. He argued these facts and claims before the circuit court. App. Brief at 7, App. Supp. Brief at 1-2. The government admits these facts, concedes error, and suggests the judgment below be vacated, US Brief 8-9, 12, although it does not go so far as to admit the constitutional violation. It is Bousley's view, however, that both the court of appeals and the government misapprehend the nature of his claims, the "waiver" issue, the "procedural default" issue, and the rights he seeks to assert in these proceedings.

The circuit court concluded that Bousley had "waived" these rights by pleading guilty, citing *United States v. Broce*, 488 U.S. 563 (1989), 97 F.3d at 287, JA 161. However, a guilty plea cannot "waive" either a defendant's right to an accurate explanation of the charges he faces, or the right to challenge the government's authority to hale him into court, for a guilty plea must be based

on an accurate explanation of the law in order to be valid. 488 U.S. at 574-75. Far from supporting the court below, therefore, *Broce* supports Petitioner, for it does not hold that a defendant "waives" all his constitutional rights by pleading guilty. *Id.* at 574. Indeed, to hold that a guilty plea could waive one's Sixth Amendment right to be informed of the nature and cause of the charges he faces, where the violation is shown on the trial court record, would eviscerate the right. As the discussion at p. 16 above shows, *Broce* recognizes this and reaffirms the cases which permit collateral attack. Where, as here, the constitutional violation is clearly shown on the trial court record, the defendant should be entitled, at a minimum, to have his guilty plea set aside. And where, as here, the record also establishes his factual innocence, he should be entitled to have the charge dismissed.

B. PETITIONER'S ATTACK ON HIS GUILTY PLEA SHOULD NOT BE DEFAULTED, BECAUSE IT IS BASED ON A FUNDAMENTAL DEFECT IN THE PROCEEDINGS WHICH APPEARS ON THE FACE OF THE RECORD, AND WHICH BOUSLEY HAS NEVER HAD A CHANCE TO LITIGATE

The court of appeals found that Bousley's claims had been procedurally defaulted because he "waived the right to collateral review by failing to preserve [the] issue on appeal," 97 F.3d 284, 287 n. 2. The government assumes, without discussion, that this ruling was correct, US Brief at 9-10. However, Bousley's claims are not the kind which are subject to procedural default, and imposing "default" would encourage piecemeal litigation and needless relitigation of well-settled precedent.

1. Procedural Default Has No Application To Bousley's Claims

Procedural default is an affirmative defense that must be asserted and established by the government. It can be waived if not timely asserted, *see Gray v. Netherland*, 116 S. Ct. 2074, 2082 (1996), and its applicability should not be presumed. However, procedural default cannot be established merely by showing that some or all of the facts upon which a collateral attack is based can be found in the trial record. Instead, it must be shown that a defendant already had a full and fair opportunity to litigate the claim to be defaulted, with due regard for the underlying goals of judicial economy and repose. Moreover, some rights are so fundamental that they can always be vindicated through collateral attack when their violation is evident from the record. Here, the claim of procedural default must fail, because Bousley never before had an opportunity to litigate the Sixth Amendment violations he asserts in these proceedings, and the violation of his right not to be haled into court appears on the face of the trial record.

Bousley asserts that his guilty plea is invalid because he was not properly advised of the nature of the § 924(c) charges he faced and that he is factually innocent of those charges. The government and the circuit court below have assumed, without explanation or analysis, that Bousley could have, and should have, asserted his claims in the appeal from his sentence on the underlying drug charges. 97 F.3d at 287; US Brief 9-10. But this assumption is faulty, as a closer look at the nature of the prior proceedings and the rights at issue in them shows.

Bousley's direct appeal provided him with an opportunity to point out erroneous rulings made by the trial court, and to litigate other issues fairly raised by the trial record. Because Bousley could have questioned the propriety of the change of plea proceedings under Fed. R. Crim. P. 11, the court of appeals implicitly assumes that these proceedings subsume all the constitutional protections to which Bousley was entitled in connection with his guilty plea. If this were so, then Bousley's failure to assert a Rule 11 violation on appeal would cause the default of the constitutional claims he raises in these proceedings.

Such is not the case, however, for Rule 11 cannot amend the Constitution, and following its processes does not necessarily mean that a defendant has been properly advised of the nature and cause of the accusation against him, any more than a violation of Rule 11 necessarily establishes a violation of a defendant's constitutional rights, *United States v. Timmreck*, 441 U.S. 780, 783-784 (1979). Instead, Rule 11 only describes a process which is aimed at assuring that defendants understand what they give up by pleading guilty. *Id.* at 781-82. Rule 11 also has another job, that of helping to assure finality after valid guilty pleas are entered. *Id.* However, nothing in Rule 11 or the cases that apply it suggest that it can be used to finesse away the defendant's right to be informed of the charges he faces before entering a guilty plea.

Here, the Rule 11 procedure had exactly that effect, for the trial judge unequivocally told Bousley he was charged with "possession" of a firearm. Ch. of Plea Tr. 13-15, JA 25-27. This inaccurate information about the

elements of the § 924(c) charge was reinforced by Bousley's attorney, and nothing happened before the appeal was final to cure the constitutional harm thus caused. Under these circumstances, expecting Bousley to have raised his Sixth Amendment claim on direct appeal is even more unfair than requiring a defendant victimized by ineffective assistance of counsel at trial to discover and assert the claim on a direct appeal that is being handled by the same trial counsel.

It is true that an appeal lies if the defendant is prejudiced by an inadequate or erroneous set of admonitions at the Rule 11 hearing. *McCarthy v. United States*, 394 U.S. 459, 466, (1969). But Bousley's right to appeal was meaningless, because the taint that afflicted his trial court proceedings had not been removed by the time his direct appeal became final. Indeed, it was not until this Court decided *Bailey* that the wherewithal to relieve Bousley from his Sixth Amendment deprivation became available.

The rule of procedural default is intended to encourage defendants to present issues for review in a timely and orderly fashion, to foreclose relitigation of issues already decided, and to discourage piecemeal litigation. *United States v. Frady*, 456 U.S. 152 (1982); *Wainwright v. Sykes*, 433 U.S. 72 (1977). At the same time, the rights of defendants to relief from fundamental constitutional deprivations must be respected. Bousley can hardly be faulted for failing to tell the sentencing court that the court was depriving him of his constitutional right to accurate information about the charges he faced, for he had no way of knowing that the court was giving him inaccurate information. And, despite the government's bald assumption to the contrary, nothing occurred

between the proceedings in the sentencing court and the direct appeal to cure the constitutional deprivation Bousley suffered as a result of the sentencing court's misinformation. In fact, quite the opposite is true: his attorney continued to advise Bousley wrongly on the elements of § 924(c). His attorney's advice that it was futile to appeal from the guilty plea was correct, because Eighth Circuit case law was so well established. Nevertheless, this advice and the continuing vitality of cases such as *United States v. Brett*, 872 F.2d 1365 (CA8 1989) blocked Bousley's understanding of the charges he faced and the possible issues he could raise on appeal.

In sum, the Government's assertion of procedural default fails, because Bousley has never before been afforded a full and fair opportunity to litigate his Fifth and Sixth Amendment rights to be informed of the nature of the charges he faces before entering a plea.

2. Imposing Procedural Default in this Case Would Defeat the Goal of Judicial Economy and Encourage Piecemeal Litigation of Issues

Procedural default has no application to this case, because habeas corpus is the proper procedure, indeed the only available procedure, for Bousley to litigate his constitutional claims. Moreover, the principles that lead claims to be defaulted would be violated if Bousley were held to have defaulted the constitutional claims he asserts in his habeas petition.

The rule implicit in the circuit court's holding in this case promotes piecemeal litigation, and creates a class of

prisoners who are denied relief from their § 924(c) convictions solely because they happened to have appealed on other grounds before *Bailey* was decided. Moreover, the circuit court's ruling does not promote finality or judicial economy, because it encourages appellate counsel to repeatedly ask circuit courts to revisit well-settled issues of statutory construction.

Procedural default is not imposed on petitioners simply as a means of foreclosing collateral attack. Instead, petitioners are defaulted as part of an overall plan to require defendants to present their claims to the first available forum where the claims can be fully and fairly litigated. *See Murray v. Carrier*, 477 U.S. 478 (1986). Petitioners and their counsel who are aware of the risk of procedural default will raise and argue on direct appeal all claims which could potentially be defaulted. Appellate counsel who know that collateral attack is available for those claims which cannot be fully developed through the facts on the record, or which are so fundamental that their denial would invariably undermine the judgment, do not needlessly raise partial shadows of such claims on direct appeal. Under the circuit court's ruling, however, appellate counsel mindful of their duties as explained in *Anders v. California*, 386 U.S. 738 (1967) would have to add another category of issues to consider and raise in every case: claims which could conceivably come up for collateral review sometime in the future because of a possible change in settled precedent. This Court has recently rejected a similar proposed rule in connection with the plain error exception for issues raised for the first time on appeal. *Johnson v. United States*, 117 S. Ct. 1544 (1997).

Due process of law must mean more than just the opportunity to raise objections. Fundamental defects in proceedings which are "inconsistent with the rudimentary demands of fair procedure," *Hill v. United States*, 368 U.S. 424, 428 (1962), do not disappear just because they are not raised at trial or on appeal. It is the courts' responsibility to assure that these basic rules are followed. Otherwise, defense counsel would be obliged to submit a laundry list of demands that all constitutional guarantees be observed at all times, and appellate counsel would have to seek review of every well-settled circuit rule to avoid "default."

Ironically, if counsel were to follow the approach contemplated by the court of appeals, piecemeal litigation of claims would be assured. This result follows because Bousley's claim is based on *Bailey*, which could not have been raised on the direct appeal. And, having established his right to relief by pointing to the trial record and the materially inaccurate information about the § 924(c) charges found there, a litigant likely would need to supply additional facts to support his claim of remedy. Thus, the circuit court's proposed rule would not only require appellate courts to reconsider well-settled rules, it would assure that courts would have to visit the same issues twice in those rare instances where well-settled rules turn out to be wrong. It is far more efficient to permit petitioners like Bousley to assert their claims once and for all, in habeas corpus proceedings.

C. BOUSLEY IS ENTITLED TO RELIEF IN ANY EVENT, BECAUSE HE HAS ESTABLISHED "CAUSE," "PREJUDICE," AND A FUNDAMENTAL MISCARRIAGE OF JUSTICE

Thus far, the discussion has focused on the inapplicability of procedural default to this case. However, even if Bousley's claims were subject to procedural default, he has established cause and prejudice. Moreover, he has also established the right to show a fundamental miscarriage of justice, as the government concedes. US Brief 7, 10-11.

This Court has recognized that a defendant who fails to raise a claim in earlier proceedings establishes "cause" when he shows that his counsel's advice was constitutionally inadequate, or shows "that the factual or legal basis for a claim was not reasonably available to counsel, . . . or that some interference by officials . . . made compliance impracticable." *Murray v. Carrier*, 477 U.S. 478, 488, 492 (1986).

Here, Bousley has shown both that the legal basis for his claim was not reasonably available to counsel and that interference by officials – viz, the circuit and trial courts – made it impracticable for Bousley to assert his claim earlier. It is evident that, before *Bailey*, any attempt to attack Bousley's guilty plea would have been futile. *See Reed v. Ross*, 468 U.S. 1 (1984). The trial court had reinforced trial counsel's advice by calling the charge against Bousley "possession" of a gun. Change of Plea Tr. 12-15, JA 24-27. His counsel relied on settled Eighth Circuit law in refusing to appeal his § 924(c) conviction, leaving Bousley without a forum to present his claim.

The prejudice Bousley has suffered is apparent, for he is now serving time in prison for acts that do not amount to a violation of § 924(c). *Murray v. Carrier*, 477 U.S. 478 (1986); *Sawyer v. Whitley*, 505 U.S. 333 (1992).

Finally, for the reasons stated by the government in its Brief (at 9), Bousley has, at a minimum, established a fundamental miscarriage of justice because he is factually innocent. Even if cause and prejudice could not be shown, Bousley would be entitled to a hearing on his claim because he has established that he is factually innocent of the § 924(c) charge. *See Schlup v. Delo*, 513 U.S. 298 (1995). Having shown that no one could be convicted for the things he has done, Bousley's situation is substantially similar to the "prototypical example of 'actual innocence'; i.e., where the wrong person was convicted," as explained in *Sawyer v. Whitley*, 505 U.S. 333, 340 (1992).

CONCLUSION

For the reasons stated above, Petitioner respectfully requests that the judgment of the Eighth Circuit Court of Appeals be reversed, and that the case be remanded with directions to reverse the judgment of the district court dismissing Bousley's Petition for Writ of Habeas Corpus, and to order that the district court enter a new and different order and judgment setting aside Bousley's plea of guilty on Count II of the indictment which charged

violation of § 924(c), and dismissing Count II with prejudice.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1997

KENNETH EUGENE BOUSLEY, PETITIONER

v.

JOSEPH M. BROOKS, WARDEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether petitioner, who pleaded guilty in 1990 to using a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c), and who did not challenge his conviction on direct appeal, may move pursuant to 28 U.S.C. 2255 to vacate his conviction in light of *Bailey* v. *United States*, 516 U.S. 137 (1995).

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 96-8516

KENNETH EUGENE BOUSLEY, PETITIONER

v.

JOSEPH M. BROOKS, WARDEN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (J.A. 156-164) is reported at 97 F.3d 284.

JURISDICTION

The judgment of the court of appeals was entered on October 3, 1996. A petition for rehearing was denied on December 18, 1996. Pet. App. 7. The petition for a writ of certiorari was filed on March 18, 1997, and was granted on September 29, 1997 (118 S. Ct. 31). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

Following a plea of guilty in the United States District Court for the District of Minnesota, petitioner was convicted of possession of methamphetamine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and use of a firearm during and in relation to a drug-trafficking offense, in violation of 18 U.S.C. 924(c). J.A. 81. He was sentenced to 78 months' imprisonment on the drug charge and to a consecutive term of 60 months' imprisonment on the Section 924(c) charge, to be followed by four years of supervised release. J.A. 83-84. Petitioner appealed his sentence and the court of appeals affirmed. *United States* v. *Bousley*, 950 F.2d 727 (8th Cir. 1991) (Table).

Petitioner subsequently filed a motion under 28 U.S.C. 2255, attacking the validity of his plea to the Section 924(c) charge. J.A. 104-114.[1] That motion was denied. J.A. 154-155. Petitioner appealed, and the court of appeals affirmed the denial of petitioner's motion. J.A. 156-165.

1. a. On March 19, 1990, police officers executed a search warrant at petitioner's house in Minneapolis, Minnesota. The officers found two coolers in the

[1] Although petitioner styled his pleading as a petition for habeas corpus pursuant to 28 U.S.C. 2241, and named Joseph M. Brooks, the warden of the prison where he was incarcerated, as the respondent, the district court treated the petition as a motion under Section 2255. J.A. 104, 145 & n.2. We are therefore filing a motion requesting the Court to substitute the United States as the respondent. See Rules Governing Section 2255 Proceedings, Rule 2 advisory committee's note (1976 Adoption) ("[T]here is no requirement that the movant name a respondent" in a Section 2255 proceeding since it is a motion in the criminal case and "the federal government is the movant's adversary of record."); cf. Sup. Ct. R. 35.4.

garage. Inside the coolers were two briefcases containing 3,153 grams (about seven pounds) of a mixture containing methamphetamine. The briefcases also contained two loaded handguns and one unloaded handgun. A coffee can in the garage contained an additional 33 grams of methamphetamine mixture. The officers found another 6.9 grams of methamphetamine mixture and two loaded handguns in petitioner's bedroom. J.A. 8, 157.

b. Petitioner was charged in a superseding indictment with possession of methamphetamine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and with use of a firearm during and in relation to a drug-trafficking offense, in violation of 18 U.S.C. 924(c). J.A. 5-6.[2] He subsequently agreed to plead

[2] The Section 924(c) count of the indictment alleged that:

> On or about March 19, 1990, in the State and District of Minnesota, the defendant,
>
> KENNETH EUGENE BOUSLEY,
>
> knowingly and intentionally used the following firearms during and in relation to a drug trafficking crime; namely, the crime of possession of methamphetamine with the intent to distribute it[,] which is a felony that may be prosecuted in a court of the United States:
>
> A loaded Walther PBK .38 caliber handgun, serial no. A016494;
>
> A loaded .22 caliber Advantage Arms 4-shot revolver;
>
> A loaded .22 caliber North American Arms handgun, serial no. C7854;
>
> A loaded .45 caliber Colt Model 1911 semi-automatic handgun, serial no. 244682;
>
> An unloaded Ruger .357 caliber revolver, serial no. 151-36099;

guilty to both charges, while reserving the right to challenge the quantity of drugs used to determine his sentence. J.A. 7-12.

The plea agreement contained the following stipulation on the factual basis for the plea:

> The parties also agree that, on or about March 19, 1990, * * * [petitioner] knowingly used firearms during and in relation to a drug-trafficking offense, namely the offense of possession with the intent to distribute methamphetamine. The following firearms were found in [petitioner's] bedroom near the 6.9 grams of methamphetamine: a loaded Walther PBK .380 caliber handgun, serial number A016494; and a loaded .22 caliber Advantage Arms 4-shot revolver. [Petitioner] admits ownership and possession of these two guns.

J.A. 8. Petitioner admitted that he was aware that there were 6.9 grams of methamphetamine mixture in his bedroom and 33 grams of methamphetamine mixture in the coffee can in his garage. He also acknowledged that the police had seized 3,153 grams of methamphetamine mixture and three other firearms from two briefcases in his garage. J.A. 7-8.

At the change-of-plea hearing, the court conducted the colloquy required by Federal Rule of Criminal Procedure 11. When the district court asked petitioner if he knew what he was charged with in the second count of the indictment, petitioner initially responded, "[p]ossession of a firearm." J.A. 25. The district court immediately explained to petitioner

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> all in violation of Title 18, United States Code, Section 924(c).

J.A. 5-6.

that he was charged with "possessing the firearms during * * * and in relation to a drug trafficking crime." *Ibid.* Petitioner admitted that he owned the two firearms that were seized from his bedroom, and he agreed that they were in close proximity to the 6.9 grams of methamphetamine mixture (which he contended were for personal use). J.A. 24, 27. Petitioner acknowledged that he had been making sales of methamphetamine from the premises within the 72-hour period preceding the application for the search warrant. J.A. 28-29. He also admitted that he had intended to sell the 33 grams of methamphetamine mixture in the coffee can. J.A. 24. Although he initially denied keeping the guns in his bedroom in order to assist in his sales of illegal drugs, he subsequently acknowledged that the guns were "available" if he needed them for that purpose. J.A. 27.[3] Defense counsel declared that he was "satisfied under the state of the law in [the Eighth] Circuit that there is a factual basis" for petitioner's plea of guilty to the Section 924(c) charge. *Ibid.* Petitioner then pleaded guilty to both counts. J.A. 29. The district court accepted the pleas, finding that petitioner was "competent to enter these pleas, that they've been voluntarily entered, and that there is a factual basis for them." J.A. 29-30.

c. The district court conducted an evidentiary hearing for purposes of sentencing. At the hearing, petitioner admitted that he owned the two guns seized from his bedroom, but denied knowledge that any other guns were on his premises. J.A. 59. Petitioner

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[3] The district court explained to petitioner that, if he wanted to contest the issue of the relationship between the drugs and the firearms, he would have to go to trial. Petitioner indicated that he understood. J.A. 28.

testified that he had bought methamphetamine about 30 times in his garage between September 1988 and March 19, 1990 (the date of his arrest); that the largest quantity delivered to him was about 12 ounces; that that quantity had been delivered on March 18, 1990; that he had weighed out a portion of that methamphetamine into distribution quantities for his source and put the rest into the coffee can in the garage; that the methamphetamine in the coffee can and in his bedroom on March 19 belonged to him and was the only methamphetamine he knew to be on his premises that day; and that he "wasn't fully aware" that the briefcases were on his premises on March 19, but that he had seen one of them (the "small, narrow, brown" one containing about two of the seven pounds of methamphetamine mixture) in his garage in September or October 1989. J.A. 53-58. Petitioner admitted that, on the day of his arrest, when the police asked him if he knew that the briefcases contained methamphetamine, he replied, "I knew what—that there was some. I didn't think there was what you said, seven pounds or whatever." J.A. 65. Petitioner acknowledged that his statement to the police was true and correct. J.A. 64.[4]

Following the hearing, the district court determined that petitioner's sentence should be based on

[4] The statement, which was transcribed in question-and-answer format, was signed by petitioner, Gov't C.A. Br. Addendum 1-21 (No. 90-5598), and admitted into evidence at the hearing. J.A. 67-68. Also at the hearing, FBI Agent Michael Kelly testified that on March 21, 1990, petitioner gave an "extensive" statement in which he admitted that, over the three-month period between December 1989 and February 1990, his source had supplied him with a total of about six pounds of methamphetamine at petitioner's residence. J.A. 67-73.

946.9 grams of methamphetamine mixture, which was the combined total of the quantities found in petitioner's bedroom (6.9 grams), in the coffee can (33 grams), and in one of the two briefcases (907 grams). J.A. 78-79, 91. The district court concluded that a five-year mandatory-minimum sentence applied to the drug count, pursuant to 21 U.S.C. 841(b)(1)(B)(viii) (five-year mandatory-minimum sentence applies to violations of Section 841(a) involving "100 grams or more of a mixture or substance containing a detectable amount of methamphetamine"). 11/2/90 Sent. Tr. 3-5. It further concluded that petitioner's offense level was 28 and his criminal-history category was I. *Id.* at 5. That resulted in a Guidelines range of 78-97 months' imprisonment on the drug count. *Ibid.* The court imposed a sentence of 78 months' imprisonment on the drug count, a consecutive term of 60 months' imprisonment on the Section 924(c) count, and four years of supervised release. J.A. 83-84.

2. Petitioner appealed his sentence, challenging the district court's finding that he should be held accountable for slightly under a kilogram of methamphetamine mixture. Pet. C.A. Br. (No. 90-5598). Petitioner did not challenge the validity of his plea to the Section 924(c) charge. The court of appeals affirmed. *United States* v. *Bousley*, 950 F.2d 727 (8th Cir. 1991) (Table).

3. On June 6, 1994, petitioner filed a *pro se* petition for a writ of habeas corpus under 28 U.S.C. 2241. J.A. 104-109. He challenged the factual basis for his guilty plea on the ground that neither the "evidence" nor the "plea allocution" showed a "connection between the firearms in the bedroom of the house, and the garage, where the drug trafficking occurred." J.A. 109; see also J.A. 110-114. The government opposed the peti-

tion, arguing that petitioner had procedurally defaulted his claim by not raising it on direct appeal, and that in any event there was an adequate factual basis for the plea. J.A. 123-126. In response, petitioner argued that his procedural default should be excused because he had received ineffective assistance of counsel. J.A. 128-129.[5] On the merits, petitioner argued that "[t]here was no connection between the drugs and the firearms in this case—the guns simply happened to be in the house well away from the drugs in the unattached garage." J.A. 131.

A magistrate judge recommended that the petition be treated as a motion under 28 U.S.C. 2255 and dismissed. J.A. 144-153. The magistrate judge concluded that there was a factual basis for petitioner's guilty plea because the guns in petitioner's bedroom were in close proximity to drugs and were readily accessible. J.A. 148-153. The district court adopted the magistrate judge's Report and Recommendation and ordered that the petition be dismissed. J.A. 154-155.

4. Petitioner appealed. While his appeal was pending, this Court held, in *Bailey* v. *United States*, 516 U.S. 137 (1995), that a conviction for use of a firearm under Section 924(c) requires the government to show "active employment of the firearm." *Id.* at 144. Active employment includes uses such as "brandishing, displaying, bartering, striking with, and, most obviously, firing or attempting to fire" the weapon.

[5] Petitioner rested his assertion of ineffective assistance of counsel on a series of letters between himself and his trial attorney, all dated after petitioner's guilty plea, concerning petitioner's belief that a jury might acquit him on the Section 924(c) charge because there was an inadequate nexus between the guns and the drugs. J.A. 133-143.

Id. at 148. The Court held, however, that mere possession of a firearm does not constitute a "use." *Id.* at 143. Thus, "[a] defendant cannot be charged under § 924(c)(1) merely for storing a weapon near drugs or drug proceeds," or for "placement of a firearm to provide a sense of security or to embolden." *Id.* at 149.

After the decision in *Bailey*, the court of appeals appointed counsel to represent petitioner. Petitioner's attorney filed a supplemental brief arguing that petitioner's Section 924(c) conviction should be vacated in light of *Bailey*. Pet. Supp. C.A. Br. (No. 95-2687). Petitioner argued that *Bailey* should be applied retroactively, that his plea of guilty was involuntary because he was misinformed about the elements of a Section 924(c) offense, and that this claim was not waived by his guilty plea. *Id.* at 2-5. The government filed a responsive supplemental brief, reiterating the argument that petitioner had waived his claim, because he had pleaded guilty and had failed to challenge the validity of his plea on direct appeal. Gov't Supp. C.A. Br. 2-5 (No. 95-2687).[6]

5. The court of appeals affirmed the district court's order dismissing petitioner's motion. J.A. 156-165. The court of appeals began by noting that petitioner had failed to challenge the validity of his Section 924(c) plea on his direct appeal. As a result, the court of appeals concluded, "[a]bsent a showing of cause and prejudice, [petitioner] may not now bring

[6] The government also pointed out that its decision not to cross-appeal from the district court's holding that petitioner was responsible for only some of the methamphetamine mixture had been influenced by the assumption that petitioner was not contesting the validity of his Section 924(c) conviction. Gov't Supp. C.A. Br. 4-5 (No. 95-2687).

[this] claim[] through collateral attack." J.A. 159. The court of appeals rejected petitioner's contention that his procedural default should be excused because neither he nor his counsel could have foreseen the *Bailey* decision. Relying on *United States* v. *McKinney*, 79 F.3d 105, 109 (8th Cir. 1996), the court concluded that "*Bailey* does not resurrect a challenge to a section 924(c) conviction that has been procedurally defaulted." J.A. 160.[7]

Nor, the court concluded, did petitioner's guilty plea excuse his procedural default. The court reasoned that "a defendant who enters a guilty plea with no conditions as to guilt waives all challenges to the prosecution of his or her case except for those related to jurisdiction." J.A. 160 (internal quotation marks omitted). The court noted that "a plea agreement is a process of negotiation and concession," and it declined to "allow this process to be undone years after the fact." J.A. 161. Accordingly, the court determined that "procedural default and waiver apply to those convictions that follow a guilty plea no less than to those that follow a trial." *Ibid.* Because the court found "no indication that [petitioner's] plea was involuntary or uninformed," it concluded that petitioner had "waived the right to collateral review of his conviction unless he can show cause for his procedural default and resulting prejudice." J.A. 162.

[7] This Court later granted certiorari in *McKinney*, vacated the judgment, and remanded for further consideration in light of *Johnson* v. *United States*, 117 S. Ct. 1544 (1997). *McKinney* v. *United States*, 117 S. Ct. 1816 (1997). On remand in *McKinney*, the Eighth Circuit vacated McKinney's Section 924(c) conviction. It applied the plain-error standard to McKinney's *Bailey* claim, which McKinney raised in a direct appeal after defaulting the claim at trial. *United States* v. *McKinney*, 120 F.3d 132 (8th Cir. 1997).

The court also rejected petitioner's claim that his default should be excused because he received ineffective assistance of counsel. In particular, the court concluded that petitioner's counsel had not acted unreasonably in advising petitioner not to challenge his Section 924(c) conviction on appeal, given counsel's understanding of the interpretation of Section 924(c) before *Bailey*. J.A. 163. The court also observed that counsel had fully explained to petitioner his reasons for recommending against raising the issue on appeal and had advised petitioner that he should seek other counsel if he nevertheless wished to do so. *Ibid.* Accordingly, the court concluded that petitioner "has waived his right to collateral review of his section 924(c) conviction by pleading guilty and by failing to challenge the conviction on direct appeal." *Ibid.*

6. Petitioner filed a petition for a writ of certiorari, arguing that *Bailey* should be applied retroactively, Pet. 7-8, and that petitioner had not waived his claim that his plea was invalid because the plea was based on an incorrect understanding of the elements of a Section 924(c) violation, Pet. 8. In responding to the petition, we expressed the view that the transcript of the plea hearing indicated that, in light of this Court's intervening decision in *Bailey*, petitioner had "such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt." Gov't Br. 9 (filed June 6, 1997). We also stated that, although the court of appeals properly held that petitioner could not show cause for his procedural default in failing to raise his claim before final judgment was entered on his guilty plea,

the court erred in suggesting that his guilty plea waived his right to seek collateral review and in failing to inquire whether petitioner should be excused from showing cause if he could make an adequate showing of "actual innocence." *Id.* at 7, 10. Accordingly, we suggested that the Court grant the petition, vacate the judgment, and remand the case for further proceedings on the question of petitioner's actual innocence. *Id.* at 7, 11-12. This Court granted plenary review, 118 S. Ct. 31 (1997), and appointed an amicus curiae to brief and argue the case in support of the judgment below, 118 S. Ct. 463 (1997).

SUMMARY OF ARGUMENT

Petitioner claims that his plea of guilty to a violation of 18 U.S.C. 924(c) was not intelligent and voluntary, because, in light of this Court's decision in *Bailey* v. *United States*, 516 U.S. 137 (1995), his plea rested upon an inaccurate understanding of the elements of Section 924(c). Pet. Br. 14-18. We agree that petitioner may rely on *Bailey* in arguing that his plea was not entered intelligently and voluntarily in a motion filed pursuant to 28 U.S.C. 2255. Petitioner may not raise that claim for the first time on collateral review, however, unless he can make a sufficient showing of actual innocence under Section 924(c) as construed in *Bailey*.

A. This Court's decision in *Bailey* defines the substantive reach of a federal criminal statute, and thus should have full retroactive application to cases on collateral review. A decision of this Court construing a federal statute "is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 312-

313 (1994). There are no common law crimes in the federal system, and the lower federal courts have no power to create criminal liability by statutory interpretation. Thus, a decision by this Court cutting back on the scope of a federal crime, as previously understood by a lower court, creates the possibility that a person has been convicted for an act that the Congress has not made criminal. An appropriate purpose of collateral review is to consider a claim that, based on such an intervening decision of this Court, a defendant may have been convicted for conduct that is not a crime.

Sound principles of finality dictate that, as a general matter, new constitutional rules of criminal procedure do not have retroactive application in cases on collateral review. *Teague* v. *Lane*, 489 U.S. 288 (1989). A similar rule of nonretroactivity should govern new interpretations of statutory procedural rights. But an intervening decision that may show that a defendant stands convicted "for an act that the law does not make criminal" stands on a different footing. *Davis* v. *United States*, 417 U.S. 333, 346 (1974). The function of the writ of habeas corpus in protecting against miscarriages of justice justifies according retroactive application to such a new decision.

B. In light of *Bailey*, petitioner's plea of guilty was not intelligent and voluntary. All of the participants at petitioner's guilty plea incorrectly believed that petitioner could properly be convicted of using a firearm in violation of Section 924(c) without any element of active use of the firearm. Under this Court's subsequent decision in *Bailey*, that understanding was incorrect. And petitioner did not acknowledge active use of a firearm in the proceedings on his plea. Under

those circumstances, petitioner had "such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt." *Henderson* v. *Morgan*, 426 U.S. 637, 645 n.13 (1976).

It is true that the misunderstanding of Section 924(c) was reasonable in light of Eighth Circuit case law at the time of petitioner's plea. It is also settled that, with respect to most legal issues, a guilty plea is not rendered constitutionally invalid because the decision to plead guilty was influenced by what turns out to be, in hindsight, an incorrect understanding of the law. See, *e.g.*, *Brady* v. *United States*, 397 U.S. 742, 756-758 (1970). But a guilty plea entered on the basis of gravely inaccurate information about the true elements of the charged offense may not be intelligent and voluntary. Whatever the reasonable understanding of Section 924(c) at the time of his guilty plea, petitioner did not receive "real notice of the true charge against him, the first and most universally recognized requirement of due process." *Smith* v. *O'Grady*, 312 U.S. 329, 334 (1941).

C. By failing to challenge the voluntariness of his guilty plea on direct appeal, however, petitioner procedurally defaulted that claim. See *Reed* v. *Farley*, 512 U.S. 339, 354 (1994); *United States* v. *Frady*, 456 U.S. 152, 168 (1982). Ordinarily, a defaulted claim cannot be heard on collateral review absent a showing of cause to excuse the default and prejudice from failing to entertain the claim. Petitioner has not established cause for his procedural default. This Court's decision in *Engle* v. *Isaac*, 456 U.S. 107, 130 (1982), forecloses petitioner's claim that his default should be excused because it would have been futile for him to raise the claim on direct appeal. Nor can petitioner's default be excused on the ground that his claim was

novel, because many other defendants perceived and raised various forms of the claim. *Smith* v. *Murray*, 477 U.S. 527, 537 (1986).

Because petitioner defaulted his claim, and cannot establish cause for that default, his claim cannot be reviewed in this collateral proceeding unless he can demonstrate that the "constitutional violation has probably resulted in the conviction of one who is actually innocent" under Section 924(c). *Murray* v. *Carrier*, 477 U.S. 478, 496 (1986). Review of a claim of actual innocence should consider not only the evidence adduced at the plea colloquy, but also such additional evidence as the parties may have to offer on the issue of culpability under Section 924(c). No such inquiry has been conducted here. Accordingly, the case should be remanded to permit petitioner to attempt to carry the burden of demonstrating his actual innocence.

ARGUMENT

PETITIONER MAY CHALLENGE HIS GUILTY PLEA BASED ON THIS COURT'S INTERVENING DECISION IN *BAILEY* v. *UNITED STATES* IF HE CAN OVERCOME HIS PROCEDURAL DEFAULT BY MAKING A SHOWING OF ACTUAL INNOCENCE

A. A Decision That Narrows The Substantive Scope Of A Federal Criminal Statute Has Retroactive Application In Collateral Challenges

In the federal system, the exclusive power to define criminal acts resides with Congress. There is neither a federal common law of crimes, *United States* v. *Hudson*, 11 U.S. (7 Cranch) 32 (1812), nor power vested in the judiciary to create criminal offenses through construction of statutes, *United States* v.

Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820). See *United States* v. *Lanier*, 117 S. Ct. 1219, 1226 n.6 (1997) ("Federal crimes are defined by Congress, not the courts."). While lower federal courts may reach varying conclusions about the scope of a substantive criminal statute, a holding by this Court that a criminal statute does not extend to certain conduct "is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 312-313 (1994). "[W]hen this Court construes a statute, it is explaining its understanding of what the statute has meant continuously since the date when it became law." *Id.* at 313 n.12.

At the time petitioner pleaded guilty to a violation of 18 U.S.C. 924(c) in 1990, the decisional law of the Eighth Circuit permitted conviction based on possession of a firearm without establishing "active use" of the firearm. See, *e.g.*, *United States* v. *Young-Bey*, 893 F.2d 178, 181 (8th Cir. 1990); *United States* v. *Golter*, 880 F.2d 91, 94 (8th Cir. 1989); *United States* v. *Matra*, 841 F.2d 837, 841-842 (8th Cir. 1988). Thus, when the district court informed petitioner of the elements of an offense under Section 924(c) and determined whether petitioner understood that offense, it correctly followed Eighth Circuit law that "possession" of a firearm during and in relation to a drug offense constituted an offense. It is now clear, however, that "the Court[] of Appeals had misinterpreted the will of the enacting Congress." *Rivers*, 511 U.S. at 313 n.12. Section 924(c)'s prohibition of the "use" of a firearm never comprehended mere possession of a firearm; rather, the statute always required a showing of "active employment." *Bailey* v. *United States*, 516 U.S. 137, 144, 148 (1995); *Rivers*, 511 U.S. at 313 n.12. Thus, the district court's explanation of the elements of an offense under Section 924(c) was incorrect.

If *Bailey* had been handed down while petitioner's case was pending on direct review, petitioner could, without doubt, have claimed the benefit of the construction of Section 924(c) announced in *Bailey*. See *Griffith* v. *Kentucky*, 479 U.S. 314 (1987); *Penry* v. *Lynaugh*, 492 U.S. 302, 314 (1989). Petitioner's direct appeal was completed in 1991, however, and his conviction therefore became final four years before *Bailey* was decided. The question therefore arises whether *Bailey* has retroactive application to cases, like this one, that arise on collateral review.[8] This Court has not directly faced the question whether a decision narrowing the substantive scope of a federal criminal statute is retroactively applicable on collateral review. Principles underlying the Court's collateral-review jurisprudence, however, suggest the answer. Where a defendant claims he may have been convicted of a federal criminal offense based on a materially inaccurate understanding of its elements, the intervening decision does have retroactive application.

Assessing the retroactive effect of a new judicial decision in cases on collateral review requires strik-

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[8] Petitioner's Section 2255 motion was filed in June 1994, and he filed a notice of appeal from the denial of that motion in June 1995. J.A. 4, 104-109. Although Section 2255 was amended by the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 105, 110 Stat. 1220, those amendments do not apply to the present case. Cf. *Lindh* v. *Murphy*, 117 S. Ct. 2059, 2063-2068 (1997) (AEDPA's amendments to 28 U.S.C. 2254 do not apply to petitions pending on April 24, 1996, the effective date of the AEDPA).

ing a balance between the interest in finality and the interests served by providing a remedy in the nature of habeas corpus. *Teague* v. *Lane*, 489 U.S. 288, 305-314 (1989) (plurality opinion of O'Connor, J.). In light of "the purposes for which the writ of habeas corpus is made available," this Court has held that, subject to limited exceptions, "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." *Id.* at 306, 310 (plurality opinion); *Penry*, 492 U.S. at 313-314 (adopting *Teague* plurality's approach to retroactivity).[9] In most circumstances, the costs of retroactive application of new constitutional rules of criminal procedure on habeas corpus "far outweigh" the benefits of such application, *Teague*, 489 U.S. at 310 (plurality opinion)

[9] *Teague* identified two circumstances in which retroactive application of a new rule would be appropriate. 489 U.S. at 307, 309 (plurality opinion). The first exception is for new rules that place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Id.* at 311 (plurality opinion). The Court has since clarified that this exception also includes new rules that address "a substantive categorical guarantee accorded by the Constitution, such as a rule prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Saffle* v. *Parks*, 494 U.S. 484, 494 (1990) (internal quotation marks and brackets omitted); see *Penry*, 492 U.S. at 330 (if Eighth Amendment prohibited execution of mentally retarded persons regardless of the procedures followed, "such a rule would fall under the first [*Teague*] exception"). The second exception is limited to "watershed rules of criminal procedure" that implicate the fairness and accuracy of the criminal proceeding, *Teague*, 489 U.S. at 311-313 (plurality opinion), a class exemplified by the right to counsel in serious criminal cases, *Saffle*, 494 U.S. at 495.

(quoting *Solem* v. *Stumes*, 465 U.S. 638, 654 (1984) (Powell, J., concurring in the judgment)), for the inroads on finality in such instances are considerable, and the quest for an error-free trial is unlikely to find success in light of evolving procedural norms.

Although *Teague* and its progeny involved new constitutional rules of procedure, the logic of *Teague* extends *a fortiori* to novel interpretations of statutory rules of criminal procedure. *Teague* emphasized that "the principle of finality * * * is essential to the operation of our criminal justice system." 489 U.S. at 309 (plurality opinion). The premise of *Teague* is that collateral proceedings should not provide a "mechanism for the continuing reexamination of final judgments based upon later emerging legal doctrine." *Sawyer* v. *Smith*, 497 U.S. 227, 234 (1990). That consideration applies fully where the later emerging legal doctrine is a novel interpretation of a nonconstitutional rule of federal criminal procedure.[10]

Indeed, a nonconstitutional claim may generally not be raised in collateral proceedings at all unless it constitutes "a fundamental defect which inherently results in a complete miscarriage of justice." *United States* v. *Timmreck*, 441 U.S. 780, 783 (1979) (quoting *Hill* v. *United States*, 368 U.S. 424, 428 (1962)). Given that limitation on statutory claims, it is sensible to apply retroactivity limits to statutory claims as well.

[10] See, *e.g.*, *Taylor* v. *United States*, 985 F.2d 844, 847 (6th Cir. 1993) (applying *Teague* to preclude federal prisoner from obtaining collateral relief based on *Gomez* v. *United States*, 490 U.S. 858 (1989) (Federal Magistrates Act does not authorize magistrates to preside over jury selection without consent of parties)); *United States* v. *Judge*, 944 F.2d 523, 525 (9th Cir. 1991) (same), cert. denied, 504 U.S. 927 & 506 U.S. 833 (1992).

Both the "fundamental defect" standard and retroactivity rules respect the value of finality when a case has reached the stage of collateral review. Each plays a role in reducing the costs of granting collateral relief for a procedural defect that was not recognized and remedied at the time of trial or on direct appeal.[11]

This case, however, does not involve a new ruling of criminal procedure. Rather, it involves a decision of this Court narrowing the reach of a substantive federal criminal statute. Such a ruling stands on a different footing from the type of claims addressed by *Teague*. The definition of an offense goes to the heart of the criminal process, for it establishes the boundaries between lawful and unlawful conduct. When this Court has construed a criminal statute not to embrace conduct covered under the interpretation of a

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[11] Petitioner and his amici suggest that *Teague* principles do not apply to motions filed by federal prisoners pursuant to Section 2255. ACLU Amicus Br. 14; NACDL/FAMM Amici Br. 11. This Court, however, has repeatedly rejected claims that it should distinguish between federal and state prisoners when applying analogous limitations on the scope of habeas relief. See, *e.g.*, *United States* v. *Frady*, 456 U.S. 152, 166 (1982). Indeed, Justice Harlan's opinion in *Mackey* v. *United States*, 401 U.S. 667, 675-702 (1971) (concurring in the judgments in part and dissenting in part), which largely informed the reasoning of *Teague*, 489 U.S. at 310 (plurality opinion), expressly noted that no distinction should be drawn, "for retroactivity purposes, between state and federal prisoners seeking collateral relief." 401 U.S. at 681 n.1 (Harlan, J., concurring in the judgments in part and dissenting in part). And the lower federal courts have consistently held *Teague* to apply to federal prisoners. See, *e.g.*, *United States* v. *Swindall*, 107 F.3d 831, 834 n.4 (11th Cir. 1997); *Van Daalwyk* v. *United States*, 21 F.3d 179, 181-183 (7th Cir. 1994); *Gilberti* v. *United States*, 917 F.2d 92, 94-95 (2d Cir. 1990).

lower federal court, the decision creates the possibility that a defendant stands convicted "for an act that the law does not make criminal." *Davis* v. *United States*, 417 U.S. 333, 346 (1974). The purposes of the writ of habeas corpus to protect against miscarriages of justice lend strong support to making such a new decision retroactively available in cases on collateral review. While the scope of the writ of habeas corpus is informed by principles of comity and finality, absent limitations imposed by Congress, "[i]n appropriate cases those principles must yield to the imperative of correcting a fundamentally unjust incarceration." *Engle* v. *Isaac*, 456 U.S. 107, 135 (1982); Henry Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 151 n.37 (1970) ("[T]he prime objective of collateral attack should be to protect the innocent.").

In *Davis* v. *United States*, *supra*, this Court addressed the related question whether a defendant may state a cognizable claim under Section 2255 where an intervening decision, rendered after the affirmance of a conviction, indicates that a defendant has been convicted for "an act that the law does not make criminal." 417 U.S. at 346. The Court held that such a claim is cognizable, explaining that "[t]here can be no room for doubt that such a circumstance inherently results in a complete miscarriage of justice and presents exceptional circumstances that justify collateral relief under § 2255." *Id.* at 346-347 (internal quotation marks and brackets omitted). Although the Court did not decide whether the intervening decision of the court of appeals in that case should have retroactive effect, see *id.* at 341 n.12 (reserving question of retroactivity), the Court's recognition that a claim based on an intervening decision is cognizable under

Section 2255 to avoid a "complete miscarriage of justice" is instructive. If an intervening decision were held to have no retroactive application in Section 2255 proceedings, despite its determination of what the statute "*always* meant," *Rivers*, 511 U.S. at 313 n.12, a basic purpose that justifies collateral review would be defeated. The result could be to permit the imprisonment of an individual based on the commission of an "offense" defined by lower federal courts rather than by Congress.

The decision in *Bailey* adopted a narrowing construction of the crime defined in Section 924(c), compared to the definition applied under circuit law at the time of petitioner's plea. Petitioner should therefore be permitted to rely on *Bailey*'s construction of Section 924(c) in arguing that he is entitled to collateral relief from his plea of guilty.[12]

B. Petitioner's Guilty Plea Was Not Intelligent And Voluntary Because He Did Not Have An Understanding Of An Essential Element of Section 924(c)

1. "A plea of guilty and the ensuing conviction comprehend all of the factual and legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence." *United States* v. *Broce*, 488 U.S. 563, 569 (1989). The plea not only waives the defendant's rights to a trial by jury, to confrontation

[12] The courts of appeals have so held in considering the retroactive effect of *Bailey* to cases on collateral review. See, *e.g.*, *United States* v. *Barron*, 127 F.3d 890, 893 n.2 (9th Cir. 1997); *Stanback* v. *United States*, 113 F.3d 651, 654 & n.2 (7th Cir. 1997); *United States* v. *McPhail*, 112 F.3d 197, 199 (5th Cir. 1997); *United States* v. *Barnhardt*, 93 F.3d 706, 708-709 (10th Cir. 1996).

of his accusers, and to assertion of the privilege against compulsory self-incrimination, but also constitutes an admission that the defendant committed an offense. *Boykin* v. *Alabama*, 395 U.S. 238, 242-243 (1969).

To perform those functions validly, a guilty plea must be intelligent and voluntary. See, *e.g.*, *Henderson* v. *Morgan*, 426 U.S. 637, 645 (1976); *Boykin*, 395 U.S. at 242-243. A guilty plea is not "voluntary[,] in the sense that it constituted an intelligent admission that [the defendant] committed the offense[,] unless the defendant received 'real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process.'" *Henderson*, 426 U.S. at 645 (quoting *Smith* v. *O'Grady*, 312 U.S. 329, 334 (1941)). As the Court explained in *Henderson*:

> A plea may be involuntary * * * because [the defendant] has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt. Without adequate notice of the nature of the charge against him, or proof that he in fact understood the charge, the plea cannot be voluntary in this latter sense.

Id. at 645 n.13. Put another way, a plea of guilty "cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." *Broce*, 488 U.S. at 570 (quoting *McCarthy* v. *United States*, 394 U.S. 459, 466 (1969)). Applying that principle, this Court in *Henderson* held that, where a state defendant was not informed that second-degree murder required proof of intent to kill, and he did not admit or imply that he had such an intent, the defendant's plea of guilty to second-degree murder was

involuntary, thus justifying relief under 28 U.S.C. 2254. 426 U.S. at 644-647.

2. Relying on *Henderson*, petitioner argues that he was deprived of the "right to be informed of the nature of the charges he faced." Pet. Br. 10-11. He does not base that claim on the theory that the advice he received was incorrect in light of prevailing circuit law. Pet. Br. 31-32. Nor could he make such a claim. The explanation that petitioner received of the elements of Section 924(c) was reasonable in light of Eighth Circuit case law at the time of the change-of-plea hearing. See p. 16, *supra*. Under this Court's decision in *Bailey*, however, that explanation was deficient. The question, therefore, is whether the intelligent and voluntary character of the plea is assessed in light of then-current law or under the offense as defined in *Bailey*.[13]

Normally, a guilty plea is not rendered unintelligent or involuntary when it appears that a defendant's decision to plead guilty was influenced by legal or factual premises that later turn out to be wrong. In *Brady* v. *United States*, 397 U.S. 742 (1970), for example, this Court stated that "a voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise." *Id.* at 757; see also *McMann* v. *Richardson*, 397 U.S. 759, 774 (1970) (a defendant who pleads guilty "does so under the law then existing

[13] The guilty plea itself does not waive a claim that the plea was not intelligent and voluntary. See, *e.g.*, *Henderson*, 426 U.S. at 644-647; cf. *McCarthy*, 394 U.S. at 462-467 (defendant who pleaded guilty can raise on direct appeal claim that trial court failed to comply with requirements of Fed. R. Crim. P. 11).

* * * [and] assumes the risk of ordinary error in either his or his attorney's assessment of the law and facts").

Under that principle, a guilty plea is not rendered invalid because the defendant's decision to plead guilty was influenced by counsel's competent but incorrect advice about the admissibility of evidence, the possible sentencing consequences of going to trial, or the existence of possible constitutional claims or defenses. See *Broce*, 488 U.S. at 569-574 (voluntary and counseled guilty pleas were not invalid simply because defendants did not consciously relinquish potential double jeopardy defense to one count of conviction); *Tollett* v. *Henderson*, 411 U.S. 258, 261-269 (1973) (absent ineffective assistance claim, defendant who pleaded guilty on advice of counsel cannot raise claim of racial discrimination in selection of grand jury simply because he was not advised of it); *McMann*, 397 U.S. at 766-775 ("a defendant's plea of guilty based on reasonably competent advice is an intelligent plea not open to attack on the ground that counsel may have misjudged the admissibility of the defendant's confession"); *Brady*, 397 U.S. at 756-758 (guilty plea not invalid where counsel advised defendant, correctly under then-existing law, that defendant could receive death sentence if he went to trial); *Parker* v. *North Carolina*, 397 U.S. 790, 794-798 (1970) (guilty plea not invalid based on counsel's possibly incorrect assessment of sentencing exposure after a trial or admissibility of confession). As the Court summarized in *Brady*: "A defendant is not entitled to withdraw his plea merely because he

discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action." 397 U.S. at 757.

The weight attached to guilty pleas in finally resolving criminal liability reflects the seriousness of the entry of a plea. "[A] guilty plea is a grave and solemn act to be accepted only with care and discernment." *Brady*, 397 U.S. at 748. Even before entry of a judgment of conviction based on a plea, courts enforce that act absent a "fair and just reason" for setting the plea aside. See *United States* v. *Hyde*, 117 S. Ct. 1630, 1634 (1997) (construing Fed. R. Crim. P. 32(e)). The reasons for adhering to a guilty plea on collateral review are even more compelling. See *Broce*, 488 U.S. at 572-574. With the passage of time, the fading of memories, and the possibility that the government may no longer be able to reconstruct its case, setting aside a guilty plea on collateral review based on a change in the law may seriously impair the fair determination of guilt. Moreover, as this Court suggested in *Broce*, "the already substantial interest the Government has in the finality of [a guilty] plea" may be further heightened where the plea is part of "a plea *bargain* which incorporates concessions by the Government." *Id.* at 576. See also, *e.g.*, *Blackledge* v. *Allison*, 431 U.S. 63, 71 (1977) ("[T]he guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned. * * * These advantages can be secured, however, only if dispositions by guilty plea are accorded a great measure of finality.").

Nevertheless, the policies favoring finality in guilty-plea cases are not absolute.[14] This case involves an erroneous legal premise about whether the acts committed by the defendant constitute an offense at all. A bedrock requirement for an intelligent and voluntary plea is that the defendant have an adequate understanding of whether the conduct at issue constitutes a crime. Where there is a change in the decisional law governing the elements of the offense, a defendant may have been deprived of "real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process." *Henderson*, 426 U.S. at 645 (quoting *Smith* v. *O'Grady*, 312 U.S. at 334). The requirement of a voluntary plea in that sense cannot fairly be limited to the law prevailing at the time of the plea, without risking the possibility that a defendant may have pleaded guilty based on conduct that is not criminal.

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[14] See generally *Broce*, 488 U.S. at 569-576 (plea of guilty may be challenged where "constitutional infirmity in the proceedings [lies] in the State's power to bring any indictment at all," and infirmity is apparent on face of record) (citing *Menna* v. *New York*, 423 U.S. 61 (1975) (per curiam); *Blackledge* v. *Perry*, 417 U.S. 21 (1974)); see also *Haynes* v. *United States*, 390 U.S. 85, 87 n.2 (1968) (plea of guilty does not waive claim that statute defining offense of conviction violated defendant's privilege against compulsory self-incrimination). We do not agree with the suggestion of petitioner (Br. 19-20) and his amici (ACLU Amicus Br. 20-21; NACDL/FAMM Amici Br. 24-26) that the claim at issue in this case falls within the exception noted in *Broce*. Petitioner's claim—that his plea of guilty was not intelligent and voluntary and that he is actually innocent of violating Section 924(c)—is not one that goes to the power of the United States to bring a Section 924(c) charge against him, and the validity of his "actual innocence" claim is not apparent on the face of the present record. See pp. 40-42, *infra*.

In none of this Court's cases judging the voluntariness of the plea in light of then-existing law did the defendant receive what turned out to be inaccurate information about the nature of the charge to which he pleaded guilty. All instead involved allegedly inaccurate advice (or a lack of advice) about matters that were relevant to the question whether it was advisable to plead guilty to a charge that the defendant properly understood. In several of the cases, in fact, the Court indicated that the defendants had been properly advised about the nature of the charges against them. See *Broce*, 488 U.S. at 570, 574 (Fed. R. Crim. P. 11 requires that the defendant must be instructed in open court on the nature of the charge to which he is pleading guilty, and Rule 11 was satisfied in this case); *Brady*, 397 U.S. at 756 (defendant "was made aware of the nature of the charge against him").

3. Viewed in light of *Bailey*, the description of the elements of Section 924(c) at petitioner's plea hearing was materially inaccurate, and the plea was not intelligent and voluntary in the constitutional sense. The record establishes that all of the participants at the change-of-plea hearing incorrectly believed that a defendant could be convicted of using a firearm in violation of Section 924(c) even if the defendant had not made active use of the firearm, but had merely possessed it. See pp. 4-6, *supra*. And the record did not establish that petitioner admitted active use of a firearm.

Ordinarily, it is appropriate to presume that defense counsel has explained the nature of the offense in sufficient detail to give the defendant adequate notice. *Henderson*, 426 U.S. at 647; *Marshall* v. *Lonberger*, 459 U.S. 422, 436 (1983). As in *Henderson*, however, the record in the present case refutes the

ordinary presumption. See 426 U.S. at 646-647. Petitioner entered his plea of guilty under the misimpression that the facts proffered by the United States established that he had used a firearm in violation of Section 924(c), when in reality those facts did not establish that conclusion. Also as in *Henderson*, petitioner in the present case "made no factual statement or admission necessarily implying that" he had violated Section 924(c) properly understood. *Id.* at 646.[15] Under the circumstances, petitioner had "such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt." *Id.* at 645 n.13.

C. Petitioner Failed To Raise His Claim On Direct Appeal, He Cannot Show Cause For That Default, And He Therefore May Obtain Relief Only By Establishing Actual Innocence

1. *Petitioner defaulted his claim by not raising it on direct appeal*

Petitioner's claim is that the record of the plea proceeding establishes that his plea of guilty was not intelligent and voluntary. Pet. Br. 14-18. Such claims, like other challenges to the facial adequacy of a guilty plea proceeding, are properly raised on a direct appeal from the conviction entered as a result of the plea. This Court and others have so held with respect to the related claim that a plea colloquy was

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[15] In many cases in which a defendant pleaded guilty to violating Section 924(c) before the decision in *Bailey*, the defendant will have made admissions during the plea proceedings establishing a violation of Section 924(c) as this Court construed it in *Bailey*. In such cases, the defendant's Section 924(c) conviction should be sustained. See, *e.g.*, *Woodruff* v. *United States*, No. 96-3692, 1997 WL 768941, at *6 (7th Cir. Dec. 15, 1997); *Barnhardt*, 93 F.3d at 709-711.

conducted in violation of Federal Rule of Criminal Procedure 11. See *Timmreck*, 441 U.S. at 784 (claim that guilty plea proceeding was conducted in violation of Rule 11 "could have been raised on direct appeal"); *McCarthy*, 394 U.S. at 459 (direct appeal raising claim that guilty plea proceeding was conducted in violation of Rule 11); *United States* v. *Dewalt*, 92 F.3d 1209, 1211-1213 (D.C. Cir. 1996) (direct appeal claiming Rule 11 violation on ground that defendant was not properly advised of nature of offense).

It is well established that Section 2255 "will not be allowed to do service for an appeal." *Reed* v. *Farley*, 512 U.S. 339, 354 (1994) (quoting *Sunal* v. *Large*, 332 U.S. 174, 178 (1947)). It is equally well established that a federal prisoner procedurally defaults those claims not raised on direct appeal. *Ibid.* ("Where the petitioner—whether a state or federal prisoner—failed properly to raise his claim on direct review, the writ is available only if the petitioner establishes 'cause' for the waiver and shows 'actual prejudice resulting from the alleged . . . violation.'") (quoting *Wainwright* v. *Sykes*, 433 U.S. 72, 84 (1977)). See also *United States* v. *Frady*, 456 U.S. 152, 168 (1982) (where Section 2255 movant raised claim of error that was not raised at trial or on direct appeal, movant was required to establish cause for his "double procedural default").

Petitioner, however, did not raise a claim that his plea was invalid on direct appeal; his direct appeal was limited to a sentencing claim. Pet. C.A. Br. (No. 90-5598). Petitioner therefore procedurally defaulted his claim. See *Walker* v. *United States*, 115 F.3d 603, 605 (8th Cir. 1997) (Section 2255 movant procedurally defaulted claim that plea was invalid in light of *Bailey*, by not raising claim on direct appeal); *Bateman* v.

United States, 875 F.2d 1304, 1305-1307 (7th Cir. 1989) (Section 2255 movant who pleaded guilty procedurally defaulted claim that intervening decision established his innocence, by not presenting it on direct appeal).[16]

Petitioner and his amici advance two arguments in support of their claim that petitioner did not default his claim by failing to raise it on direct appeal. Neither is persuasive.

First, amici NACDL/FAMM argue that there was no procedural default in this case because "no specific procedural rule" required petitioner to raise his claim on direct appeal. NACDL/FAMM Amici Br. 15. *Reed* and *Frady*, however, make clear—as had a long line of cases before them—that criminal defendants are generally obliged to raise their claims on direct appeal. Nothing in this Court's cases suggests that any greater specificity is required, or that a procedural bar must be erected by statute or rule rather than by decisional law. In fact, this Court's cases are to the contrary. See, *e.g.*, *Smith* v. *Murray*, 477 U.S. 527, 533 (1986) (state habeas petitioner procedurally defaulted claim by failing to raise claim on direct appeal, where Virginia decisional law provided that such a failure "ordinarily" bars further consideration of claim in subsequent proceedings).

Second, petitioner and amici NACDL/FAMM argue that petitioner's claim falls within an exception to the

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[16] Some courts have considered collateral attacks on guilty pleas after *Bailey* without inquiring into procedural default. *E.g.*, *Lee* v. *United States*, 113 F.3d 73, 74-77 (7th Cir. 1997) (permitting Section 2255 movant to attack guilty plea to Section 924(c) violation notwithstanding failure to raise claim on direct appeal; no discussion of procedural default); *Barnhardt*, 93 F.3d at 708 (same). In our view, those decisions are not compatible with the general rule applied in *Frady*.

general requirement that claims be presented on direct appeal, applicable to claims which cannot be presented without further factual development. Pet. Br. 33-34; NACDL/FAMM Amici Br. 16. Although there is such an exception, petitioner's case does not fall within it.

It has long been understood that attacks on the validity of a conviction that do not require proof outside the record generally must be presented on direct appeal, while those that require such proof may in some circumstances be raised for the first time in a collateral motion. Compare, *e.g.*, *Timmreck*, 441 U.S. at 784 (claim of Rule 11 violation could have been raised on direct appeal), and *Sunal*, 332 U.S. at 177 ("Moreover, this is not a situation where the facts relied on were dehors the record and therefore not open to consideration and review on appeal."), with, *e.g.*, *Waley* v. *Johnston*, 316 U.S. 101, 104 (1942) (claim that guilty plea was coerced by threats properly raised in habeas petition; "The facts relied on are dehors the record and their effect on the judgment was not open to consideration and review on appeal.").

Petitioner's own characterization of his claim, however, makes clear that it could have been properly presented in a direct appeal, because it did not turn on facts outside the record. See, *e.g.*, Pet. Br. 11 ("the fundamental defect that undermines the reliability of his guilty plea is apparent on the record"), 16 ("[t]he defects appear on the face of the record").[17] Under

[17] The need for further proceedings to determine whether petitioner can establish actual innocence in order to be heard on his defaulted claim, see pp. 40-42, *infra*, is not inconsistent with that conclusion. Petitioner could have presented on direct appeal the claim that his plea was not intelligent and voluntary, because the record of the plea proceedings established the basis

those circumstances, petitioner was obliged to present his claim on direct appeal, and his failure to do so was a procedural default. Cf., *e.g.*, *McCleese* v. *United States*, 75 F.3d 1174, 1178 (7th Cir. 1996) (Section 2255 movant procedurally defaulted claim of ineffective assistance of counsel by failing to raise claim on direct appeal; although such claims may be raised in Section 2255 motion if extrinsic proof is required, they must be raised on direct appeal if no such proof is necessary).

Petitioner (Br. 19) and amici NACDL/FAMM (Br. 16) argue that the Eighth Circuit requires that claims of plea involuntariness be raised in a Section 2255 motion rather than on direct appeal, and that petitioner's adherence to that requirement cannot constitute a procedural default. The law in the Eighth Circuit, however, appears to be that claims requiring the development of facts outside the record—such as a claim that a plea was involuntary because coerced in some way—need not be raised on direct appeal, but claims that do not require such factual development are properly raised on direct appeal.[18] That approach is consistent with the rules of

for claiming that the elements of a Section 924(c) violation were incorrectly described. Had petitioner properly raised his claim on direct appeal, there would have been no procedural default and therefore no occasion to inquire into whether that default could be excused because of actual innocence.

[18] See, *e.g.*, *United States* v. *Young*, 927 F.2d 1060, 1061 (8th Cir.) (Rule 11 claims—including claim that defendant was not adequately advised of nature of charges—can be resolved on record of plea hearing and are properly raised on direct appeal; claims of ineffective assistance of counsel, breach of plea agreement, and involuntariness of plea should be presented to trial court in motion to withdraw guilty plea), cert. denied, 502

procedural default generally applied in federal courts. Petitioner therefore must establish a basis for having his claim heard despite his procedural default.

2. *Petitioner has failed to establish cause for his procedural default*

A Section 2255 movant who has procedurally defaulted a claim can obtain relief only by demonstrating "cause and actual prejudice." *Frady*, 456 U.S. at 167. To show cause for failing to raise a claim on appeal, a Section 2255 movant must identify "some external impediment preventing counsel from constructing or raising the claim." *Murray* v. *Carrier*, 477 U.S. 478, 492 (1986). For example, "a showing that the factual or legal basis for a claim was not reasonably available to counsel, * * * or that some interference by officials * * * made compliance impracticable, would constitute cause under this standard." *Id.* at 488. "Attorney error that constitutes ineffective assistance of counsel" would also constitute cause. *Coleman* v. *Thompson*, 501 U.S. 722, 753-754 (1991).

U.S. 943 (1991); *United States* v. *Murphy*, 899 F.2d 714, 716 (8th Cir. 1990) (claims of ineffective assistance of counsel, involuntariness of plea, and breach of plea agreement normally should be raised in Section 2255 motion, "because normally such a claim cannot be advanced without the development of facts outside the original record"); *United States* v. *Briscoe*, 428 F.2d 954, 956-957 (8th Cir.) (claims that plea was involuntary not properly brought on direct appeal, because "[a]llegations of coercive or psychological circumstances, ineffective assistance of counsel, illicit plea bargaining or other factual circumstances" require factual development by trial court; court considers on direct appeal, however, question whether defendant was properly advised of nature of charged offense), cert. denied, 400 U.S. 966 (1970).

The court of appeals correctly concluded that petitioner had not shown cause for his procedural default.[19] In this Court, petitioner does not contend that his attorney was ineffective. Rather, he asserts that his failure to raise his claim on direct appeal should be excused because it would have been "futile" for him to have raised the claim at that time. Pet. Br. 35. See also NACDL/FAMM Amici Br. 19, 21-22 & n.14 (citing cases excusing defendants' failure to challenge their Section 924(c) convictions prior to *Bailey*). It is true that, at the time of petitioner's plea, the Eighth Circuit had rejected analogous claims that a conviction for using a firearm in violation of Section 924(c) requires proof of "active use" of the firearm in question. See p. 16, *supra*. But this Court has squarely held that "futility alone cannot constitute cause." *Engle*, 456 U.S. at 130 n.36.

In *Engle*, three state prisoners sought federal habeas relief, claiming that an instruction at their trials requiring them to bear the burden of proving the affirmative defense of self-defense violated their due-process rights. 456 U.S. at 121-122. The prisoners had made no such objection at the time of trial, and thus had procedurally defaulted their claim. *Id.* at

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[19] It is not essential for this Court to resolve the question whether petitioner could establish "cause" for his procedural default. Even if petitioner could establish such cause, he would be entitled to relief only if he could also establish prejudice. Petitioner's sole claim of prejudice in this case is that he is actually innocent. Pet. Br. 36. A showing of actual innocence, however, would permit petitioner to obtain relief even if he could not establish cause. See pp. 40-42, *infra*. Thus, regardless whether petitioner can establish cause for his procedural default, he could obtain relief only if he could establish his actual innocence.

124-125. The prisoners argued, however, that their procedural default should be excused because it would have been futile for them to have raised the claim in state court. *Id.* at 130. This Court held that the futility of raising a claim cannot establish cause for a procedural default:

> [T]he futility of presenting an objection to the state courts cannot alone constitute cause for a failure to object at trial. * * * Even a state court that has previously rejected a constitutional argument may decide, upon reflection, that the contention is valid.

Ibid. Although *Engle* involved a state prisoner, the Court has repeatedly emphasized that procedural-default principles apply equally to federal and state prisoners. See, *e.g.*, *Frady*, 456 U.S. at 166 ("[W]e see no basis for affording federal prisoners a preferred status when they seek postconviction relief.").

The prisoners in *Engle* also argued that their procedural default should be excused because their due-process claim was so novel that it could not reasonably have been known at the time of trial. 456 U.S. at 130-131. Leaving open the question whether such novelty could ever constitute cause, *id.* at 131, the Court held that the prisoners' claim was not so novel as to excuse their procedural default. *Id.* at 131-134. As the Court explained, "[w]here the basis of a * * * claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labeling alleged unawareness of the objection as cause for a procedural default." *Id.* at 134.

In *Reed* v. *Ross*, 468 U.S. 1 (1984), the Court resolved the question it had left open in *Engle*, holding

that, "where a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim." *Id.* at 16. The Court in *Reed* held that the particular claim at issue in that case was sufficiently novel as to excuse the state prisoner's procedural default. *Id.* at 16-20. The Court reached that conclusion for three reasons: (1) the claim at issue challenged a practice that the Court itself had "arguably sanctioned"; (2) the practice at issue was deeply entrenched in state law, and had been so for more than a century; and (3) the case law at the time provided no direct support for the claim. *Id.* at 17-19. The Court also emphasized that the claim at issue in *Reed* was not being perceived and litigated by other defendants. *Id.* at 19-20.

Reed is of no assistance to petitioner. Petitioner's claim—that he should have been informed that Section 924(c) requires proof of "active use" of the firearm—was not "novel" within the meaning of *Reed* when petitioner failed to raise it on appeal. To the contrary, many defense counsel perceived the claim that "use" should entail "active use," and many raised it, or variations of it, in the courts of appeals.[20]

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[20] See, *e.g.*, *United States* v. *Cooper*, 942 F.2d 1200, 1206-1208 (7th Cir. 1991) (defendant took direct appeal from guilty plea to violation of Section 924(c), arguing that plea proceedings failed to establish that he used firearm rather than simply possessing it), cert. denied, 503 U.S. 923 (1992); *United States* v. *Bruce*, 939 F.2d 1053, 1055-1056 (D.C. Cir. 1991) (reversing Section 924(c) conviction for insufficient evidence, where firearm was recovered from coat pocket in which drugs were located); *United States* v. *Ross*, 920 F.2d 1530, 1536 (10th Cir. 1990) (defendant challenged sufficiency of evidence to support Section 924(c) conviction on ground that there was no evidence

Although the courts of appeals had rejected that claim in its broadest form, this Court noted that they disagreed over the proper definition of "use" for purposes of Section 924(c). See *Bailey*, 516 U.S. at 142 (Section 924(c) was "the source of much perplexity in the courts," and the courts of appeals were "in conflict both in the standards they ha[d] articulated * * * and in the results they ha[d] reached"). Under the circumstances, petitioner's procedural default cannot be excused on novelty grounds. See, *e.g.*, *Smith* v. *Murray*, 477 U.S. at 537 ("[T]he question is not whether subsequent legal developments have made counsel's task easier, but whether at the time of the default the claim was 'available' at all."; Court rejects assertion that claim was novel where "various forms of the claim * * * had been percolating in the lower courts for years").

Petitioner argues that, unless a futility exception is recognized in a case like this, "defense counsel would be obliged to submit a laundry list of demands that all constitutional guarantees be observed at all times, and appellate counsel would have to seek review of every well-settled circuit rule to avoid 'default.'" Pet. Br. 34. See also NACDL/FAMM

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of use, brandishing, or display); *United States* v. *Ocampo*, 890 F.2d 1363, 1370-1371 (7th Cir. 1989) (defendants argued that firearm was not used within meaning of Section 924(c) because it was not displayed, brandished, or actually possessed); *United States* v. *Acosta-Cazares*, 878 F.2d 945, 951 (6th Cir.) (defendant contended that "use" within meaning of Section 924(c) requires "brandishment or display"), cert. denied, 493 U.S. 899 (1989); *United States* v. *Meggett*, 875 F.2d 24, 27-29 (2d Cir.) (defendant contended that firearm was not used within meaning of Section 924(c) because it was not fired, brandished, or handled), cert. denied, 493 U.S. 858 (1989).

Amici Br. 18-20. The Court has already held in *Engle* that futility does not establish cause, and petitioner's argument thus amounts to a thinly veiled disagreement with *Engle*. In any event, petitioner's concern is unfounded. Petitioner provides no evidence that, in the nearly twenty years since *Engle*, defendants have responded by deluging trial or appellate courts with laundry lists of objections to well established rules. Such a response would be highly unlikely, particularly in light of this Court's decision in *Teague*, *supra*, which generally precludes prisoners from obtaining collateral relief on the basis of decisions overturning well established rules. See *Butler* v. *McKellar*, 494 U.S. 407, 412 (1990). There would be little incentive to make an endless series of objections to well established rules in the hope that the one of them would subsequently be overturned.

The logic of petitioner's argument suggests that a futility exception to the "plain error" standard should apply on direct appeal as well. Absent such an exception, defendants arguably have an incentive to make a laundry list of objections at trial in order to preserve all possible issues for direct appeal, in the event that a well established rule were overturned after trial. In fact, however, there is no futility exception on direct appeal. When a defendant fails to object at trial to a ruling that was plainly supported by existing precedent, the plain-error standard of review applies. *Johnson* v. *United States*, 117 S. Ct. 1544, 1548-1550 (1997). The defendant may establish the obviousness of the error by referring to the law as of the time of appeal, but otherwise must bear the burden of showing that the error affected his substantial rights and seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Ibid.* There is no

indication that the lack of a futility exception in that setting has led to a flood of objections to well established rules.

3. *The case should be remanded for a determination whether petitioner is actually innocent*

Because petitioner defaulted his claim, and cannot establish cause for that default, his claim cannot be reviewed in this collateral proceeding unless the case "falls within the 'narrow class of cases * * * implicating a fundamental miscarriage of justice.'" *Schlup* v. *Delo*, 513 U.S. 298, 314-315 (1995) (quoting *McCleskey* v. *Zant*, 499 U.S. 467, 494 (1991)). A claim of actual innocence serves as "a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Id.* at 315 (quoting *Herrera* v. *Collins*, 506 U.S. 390, 404 (1993)). A prisoner may show that his is the "extraordinary case" that falls within that class, *id.* at 324, by establishing that a constitutional error "has probably resulted in the conviction of one who is actually innocent," *Murray* v. *Carrier*, 477 U.S. at 496; see also *Schlup*, 513 U.S. at 327.

To establish actual innocence after a trial, a prisoner must show that "it is more likely than not that no reasonable juror would have convicted him" in light of "all the evidence." *Schlup*, 513 U.S. at 327-328. In a case in which an actual-innocence claim is raised after entry of a guilty plea, the parallel inquiry should encompass not only the proffer and admissions at the plea proceeding, but also any additional evidence adduced by the parties that supports or undermines the actual-innocence claim.

Because "actual innocence" means factual innocence, and not mere legal insufficiency, see, *e.g.*, *Herrera*, 506 U.S. at 404; *Kuhlmann* v. *Wilson*, 477 U.S. 436, 454 (1986) (opinion of Powell, J.), petitioner cannot carry his burden to show that he is more likely than not innocent simply by pointing to events at the moment of his arrest and by limiting the court's consideration to the record created at the Rule 11 hearing. See *Schlup*, 513 U.S. at 327-328 (actual-innocence determination must be made "in light of all the evidence"). Moreover, the government would not be bound by the existing record—which was created to satisfy a pre-*Bailey* understanding of Section 924(c)'s "use" element—should it wish to rebut any showing petitioner might make. Instead, the government would have the opportunity to present evidence, if any, that it had no occasion to present before "use" was understood to mean "active employment."

In this case, petitioner would be entitled to have his defaulted voluntariness claim considered only if he could show that he is actually innocent of a Section 924(c) offense as construed in *Bailey*. That would entail a showing both that he did not actively employ a firearm during and in relation to a drug-trafficking offense on or about March 19, 1990, and that he did not "carry" a firearm in those circumstances.[21] Only if

[21] Section 924(c) prohibits both using and carrying firearms during and in relation to a drug-trafficking offense. 18 U.S.C. 924(c); cf. *Muscarello* v. *United States*, cert. granted, No. 96-1654 (Dec. 12, 1997); *Cleveland* v. *United States*, cert. granted, No. 96-8837 (Dec. 12, 1997) (presenting question of meaning of "carry" under Section 924(c) when a firearm is transported in a vehicle). Petitioner can hardly be said to be innocent if he carried a firearm during and in relation to his acknowledged drug-trafficking offense, even if he did not actively use it. While the indictment in the present case charged petitioner solely with using the firearms in question, J.A. 5-6, the actual-

petitioner could demonstrate on a full record that he did not actively employ or carry a firearm during and in relation to a drug-trafficking crime on or about March 19, 1990, would he be able to pass through the actual-innocence "gateway * * * to have his otherwise barred constitutional claim considered on the merits." *Herrera*, 506 U.S. at 404.

Petitioner errs in asserting (Br. 36-37) that, on the present record, he is entitled to an order dismissing the Section 924(c) charge in the indictment. No court has fully considered the evidence that bears on the actual-innocence inquiry. And unless and until petitioner carries his burden of showing actual innocence, he is entitled to no relief at all. Even if such a showing were made, petitioner would be entitled at most to vacation of his Section 924(c) conviction, subject to resentencing on the remaining drug count.[22]

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innocence inquiry should not be limited to the particular manner of commission of the offense that was alleged in the indictment. Cf. *Smith* v. *Murray*, 477 U.S. at 537 (distinguishing "actual" innocence from "legal" innocence").

[22] When a defendant successfully obtains vacation of one of a number of related convictions, the United States often is entitled to have the defendant resentenced on the remaining counts of conviction. See, *e.g.*, *Pasquarille* v. *United States*, No. 96-6315, 1997 WL 754155, at *2 (6th Cir. Dec. 9, 1997) ("Every circuit that has considered this issue has held that the district court has the authority to resentence a defendant who has secured reversal of a § 924(c) conviction under § 2255.") (citing cases). In this case, if petitioner were resentenced on his remaining conviction for violating 21 U.S.C. 841(a)(1), the district court properly should impose a two-level enhancement in the offense level applicable to that charge based on petitioner's possession of a gun during the drug offenses. See *ibid.* In addition, the district court could properly consider claims of error in the imposition of the original sentence on the drug count, see, *e.g.*, note 6, *supra*. Moreover, although the issue does not arise in the present case, in cases in which charges were dismissed as part of the plea agreement the government should be permitted to resume prosecution on those dismissed counts. See, *e.g.*, *Barron*, 127 F.3d at 895-897. And courts have other authority to fashion fair remedies—or to limit relief—in the exercise of their equitable discretion. See, *e.g.*, *McCleskey*, 499 U.S. at 501 (discussing question whether the "Court should * * * exercise its equitable discretion to correct a miscarriage of justice").

CONCLUSION

The judgment of the court of appeals should be vacated, and the case remanded for further proceedings.

Respectfully submitted.

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DECEMBER 1997

REPLY

BRIEF

No. 96-8516

In the Supreme Court of the United States

OCTOBER TERM, 1997

KENNETH EUGENE BOUSLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

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KENNETH EUGENE BOUSLEY, PETITIONER

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

The amicus curiae appointed by this Court to defend the judgment of the court of appeals advances three main arguments. First, amicus claims that petitioner's reliance in his collateral motion on the supervening decision of this Court in *Bailey* v. *United States*, 516 U.S. 137 (1995), which narrowed the scope of the offense to which he pleaded guilty, is barred under principles drawn from *Teague* v. *Lane*, 489 U.S. 288 (1989). Second, amicus contends that petitioner's guilty plea itself forecloses the collateral attack, because the plea was valid in light of then-existing law. Third, amicus argues that if petitioner has a meritorious constitutional claim that his plea was not knowing, intelligent, and voluntary, he can-

not overcome his procedural default of that claim even if he shows that he is actually innocent of the charged offense. Those contentions lack merit.

1. Amicus reasons (Br. 3) that *Teague* principles preclude the retroactive application of *Bailey* in cases on collateral review because "[s]urely, if new rules of constitutional significance are generally unavailable in habeas proceedings, a similar preclusion should follow for less fundamental statutory rights." We agree that *Teague* principles apply to the interpretation of statutory rules of procedure just as they do to constitutional rules of procedure. Gov't Br. 19. The issue of statutory interpretation resolved in *Bailey*, however, did not involve procedure. Rather, it involved substance: the meaning of an element of a criminal offense. Given the character of that decision in explaining what Congress had "*always* meant" to be a crime under 18 U.S.C. 924(c), see *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 313 n.12 (1994), the retroactive effect of *Bailey* is not controlled by *Teague*.

Amicus does not question our submission that the definition of a federal criminal offense is uniquely within the legislative province. Gov't Br. 15-16. From that premise, it follows that if courts misconstrue the intent of Congress by erroneously expanding the coverage of a substantive crime, a defendant may be imprisoned for conduct that was never made criminal by the legislature. Separation of powers concerns are implicated in that situation, because the courts lack independent authority to create crimes. *United States* v. *Lanier*, 117 S. Ct. 1219, 1225 n.5 (1997). Thus, while "[n]o one would contend that Congress is powerless to proscribe the possession of guns in connection with an illegal drug deal," Amicus

Br. 12, the issue is whether Congress has done that in Section 924(c). If not, the "offense" to which petitioner pleaded guilty may rest on conduct that courts, rather than Congress, deemed to be criminal.

The line of cases beginning with *Teague* v. *Lane*, *supra*, involves rules of criminal procedure, and the underlying principle in *Teague* is that perpetual reexamination of convictions that were fair under then-existing procedures would deprive the criminal law of any possibility of finality. While concerns for finality play a powerful role in limiting the retroactive effect of procedural rules, countervailing considerations must be taken into account when this Court announces a new, and narrowing, construction of a federal offense. Even if a conviction is entered after otherwise fair procedures, it does not necessarily serve as a reliable determinant of guilt where the parties to the proceeding and the court that entered judgment operated under a serious misunderstanding of what the law required to establish the charged crime.[1]

Amicus errs in suggesting (Br. 20) that this Court's decision in *Gilmore* v. *Taylor*, 508 U.S. 333 (1993), indicates that *Teague* principles apply to decisions of this Court giving a narrowing construction to an element of a federal crime. Gilmore, a state prisoner, sought relief on the theory that "the jury instructions given at his trial violated the Four-

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[1] As amicus notes (Br. 13-15), the lower courts have applied *Teague* limitations to questions of statutory procedure and to at least one statutory sentencing limitation. No court of appeals, however, has relied on *Teague* to deny retroactive application to a decision of this Court narrowing the definition of a substantive criminal offense.

teenth Amendment's Due Process Clause * * * because they allowed a jury to return a murder verdict without considering whether the defendant possessed a mental state that would support a voluntary-manslaughter verdict instead." *Id.* at 335. Gilmore based that theory on the due process holding of a federal court of appeals in another case decided after Gilmore's conviction became final. As this Court made clear, Gilmore's claim was not "that the instructions affirmatively misstated applicable state law," or even that "they somehow lessened the State's burden of proof below that constitutionally required." *Id.* at 340. Rather, his claim was that the instruction's presentation to the jury of the greater offense before the lesser offense violated due process by restricting the jury's consideration of evidence of his affirmative defense. *Id.* at 340-344. The Court held that if due process principles required such a rule relating to affirmative defenses, it would be a new rule within the meaning of *Teague*. That holding sheds no light on the retroactivity of a decision of this Court that narrows the elements of a federal crime.

Nor is amicus correct in suggesting (Br. 21) that giving retroactive effect to decisions interpreting the elements of federal criminal statutes "would trump *Teague*, *sub silentio*, and provide automatic retroactivity on collateral review for all reinterpretations of criminal statutes, without regard, presumably, to the various restrictions placed on post-conviction proceedings by this Court in recent years." *Teague* remains the controlling precedent on new rules of criminal procedure. But there is no tension between the general nonretroactivity of such rules and our position here that narrowing constructions of federal crimes are retroactive. And the remaining restrictions imposed by this Court[2] and by Congress[3] on the availability of collateral relief are fully applicable to prisoners such as petitioner.

2. Amicus also argues (Br. 22-35) that, even if *Bailey* has retroactive application to cases on collateral review, petitioner's guilty plea remains a valid adjudication of his guilt under 18 U.S.C. 924(c) and therefore bars a collateral attack on his conviction.

a. Amicus contends (Br. 23-25) that petitioner's plea conclusively admits the commission of an offense under Section 924(c), regardless of any misunderstanding of the elements of that offense harbored by the court, the government, and the defendant. We agree that a valid guilty plea serves not simply as an admission of acts, but as an admission of guilt of a criminal offense. *United States* v. *Broce*, 488 U.S. 563, 569 (1989). But an essential ingredient of a valid plea is that it be knowing, voluntary, and intelligent.

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[2] The principal restriction relevant here is the procedural default rule defined by this Court's cases. Under that rule, consideration on collateral review of claims not raised in a timely manner on direct appeal is barred absent a showing of cause and prejudice, except in the rare case where a defendant can show that the defaulted constitutional claim probably resulted in the conviction of a defendant who is actually innocent. See Gov't Br. 29-42.

[3] In the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 105, 110 Stat. 1220, Congress placed a variety of limitations on the availability of collateral relief under 28 U.S.C. 2255. See, *e.g.*, 28 U.S.C. 2255 (one-year statute of limitations; limitations on second or successive motions). Because petitioner filed both his motion under Section 2255 and his notice of appeal before the effective date of the AEDPA, those limitations are not applicable here. See Gov't Br. 17 n.8.

Boykin v. *Alabama*, 395 U.S. 238, 242-243 (1969). As the Court has explained:

> A plea may be involuntary either because the accused does not understand the nature of the constitutional protections that he is waiving, or because he has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt. Without adequate notice of the nature of the charge against him, or proof that he in fact understood the charge, the plea cannot be voluntary in this latter sense.

Henderson v. *Morgan*, 426 U.S. 637, 645 n.13 (1976) (citations omitted). The plea of guilty itself therefore cannot waive the issue of voluntariness. *Id.* at 644-647.

Under those principles, petitioner's guilty plea cannot, by itself, foreclose his collateral attack. The premise of treating a guilty plea as a conclusive adjudication of guilt is that the defendant had an understanding of the offense that he admitted committing. Petitioner asserts that his incomplete understanding of the "use" element of Section 924(c) gives rise to an involuntariness claim under *Henderson*, *supra*. The plea itself cannot resolve that claim.[4]

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[4] We do not argue that petitioner "could not 'waive' a claim of which he was not aware." Amicus Br. 24 n.8. Rather, we argue that a showing, such as that made in this case, that the defendant had a seriously "incomplete understanding of the charge" means that "his plea cannot stand as an intelligent admission of guilt." *Henderson*, 426 U.S. at 645 n.13. We agree that a valid guilty plea waives a variety of constitutional rights, including the right to have a jury determine the element of "use." Amicus Br. 24 n.8. The issue here, however, is whether the plea *is* valid.

Amicus correctly notes (Br. 25) the importance of plea bargaining in the resolution of criminal cases. In general, the stability of the criminal justice system demands that a defendant not be permitted to escape from his end of the bargain and thus defeat the government's interest in finally resolving the case. That principle, however, should not stand as a complete barrier to a claim that, because of a change in the law, the "offense" to which the defendant pleaded guilty is not, in fact, a federal crime at all.

b. Amicus further contends (Br. 29-32) that petitioner's guilty plea must be measured solely in light of the law applicable at the time of the plea. Because petitioner's admission of guilt was valid under then-existing law, amicus argues, petitioner cannot claim that the plea was involuntary based on later legal developments. This Court's opinions in *McMann* v.

Amicus correctly notes (Br. 23 n.7) that the plea colloquy could not have led petitioner to harbor the belief that he could be convicted for mere possession of a firearm. The colloquy made clear that petitioner's "use" of the gun had to be "during, in, and in relation to" his drug trafficking offense. J.A. 25, 27. But the fundamental point remains that all participants in the plea hearing believed that mere possession could satisfy the "use" element of Section 924(c). J.A. 25. In light of *Bailey*'s holding that Section 924(c) requires active use, that belief was erroneous. Amicus suggests (Br. 23 n.7, 27 n.10, 37-38) that petitioner had doubts about whether he "used" a gun, showing that he was aware of the same argument he now makes under *Bailey* and voluntarily relinquished it. Fairly read, however, the record indicates that petitioner's questions about "use" reflected doubts about whether his possession of the firearms had the requisite relation to his drug trafficking offense (*i.e.*, the "during and in relation to" element). J.A. 28, 133-143. That is not the "active use" claim he now makes in reliance on *Bailey*.

Richardson, 397 U.S. 759 (1970), and *Brady* v. *United States*, 397 U.S. 742 (1970), do support the principle that changes in the law bearing on the premises underlying a guilty plea do not render the plea subject to collateral attack. But neither of those cases considered the question presented here, *i.e.*, whether the plea remains invulnerable even if the very definition of the offense is later narrowed. Each case involved a post-plea change in the law bearing on the advisability of admitting guilt, versus going to trial and putting the government to its proof with the attendant sentencing risks of that course of action. *McMann*, *supra* (admissibility of confession); *Brady*, *supra* (possibility of a capital sentence if convicted after a trial). Neither case involved a post-plea decision that raised doubts about whether the conduct that the defendant admitted constitutes a criminal act. See *Broce*, 488 U.S. at 572.[5]

Amicus's submission that review of the validity of a guilty plea is restricted to then-existing law would have unacceptable consequences.[6] Taken to its logi-

[5] Although amicus relies (Br. 31) on this Court's decision in *Broce*, that case did not involve a change of substantive law governing the definition of the offense. Rather, *Broce* held that the defendants in that case could not take advantage of a double-jeopardy ruling in another case after they had pleaded guilty, because their plea relinquished the right to litigate the double-jeopardy question at issue. There was no doubt, however, that the defendants had voluntarily pleaded guilty and acknowledged commission of the charged crimes. As the Court stated, "[r]espondents have not called into question the voluntary and intelligent character of their pleas, and therefore are not entitled to the collateral relief they seek." 488 U.S. at 574.

[6] As articulated by amicus (Br. 33), there is no apparent exception to that principle unless the judge "should have recognized the plea's infirmity at the time of the plea." See *ibid.* ("In *Broce*, this Court stated that the *Blackledge/Menna* exception applies only where a constitutional infirmity is of such a nature that it should have been observed 'by the presiding judge [at the time the plea was entered] on the basis of the existing record.'") (quoting *Broce*, 488 U.S. at 575) (bracketed phrase added in order to complete quote from *Broce*).

cal extreme, that principle would mean that the plea must stand even if the statute creating the offense of conviction had later been determined to be unconstitutional.[7] Similarly, it would mean that even if a defendant had not admitted to a mental element of an offense at his plea hearing (because the mental element was not recognized until a later decision of this Court), he would be foreclosed from contending that his actual intent did not subject him to criminal liability.[8] The policies favoring finality of guilty

[7] For example, in *United States* v. *Lopez*, 514 U.S. 549 (1995), this Court declared the Gun-Free School Zones Act, 18 U.S.C. 922(q) (1988 & Supp. V 1993), to be unconstitutional because it exceeded Congress's power under the Commerce Clause. A defendant who had entered a guilty plea under Section 922(q) before *Lopez* could thus be forever foreclosed from collaterally attacking his conviction notwithstanding this Court's later declaration that the statute under which he stands convicted is unconstitutional. But see *United States* v. *Knowles*, 29 F.3d 947, 950-952 (5th Cir. 1994) (rejecting plain-error and guilty-plea bar arguments, and relying on *Menna* v. *New York*, 423 U.S. 61 (1975), to grant relief from a Section 922(q) guilty plea in light of the Fifth Circuit's post-plea decision in *Lopez*, which this Court later affirmed).

[8] For example, in *Ratzlaf* v. *United States*, 510 U.S. 135 (1994), this Court held that a currency-structuring offense under former 31 U.S.C. 5322(a) required proof that the defendant knew that structuring is illegal. A strict "then-existing law" rule would mean that a guilty plea that did not admit that element (because such proof was not required under then-existing circuit law) would inflexibly bar the defendant from arguing that his conduct was not a crime. But see *United*

pleas are powerful, but they are not the exclusive concern of the criminal law. A well-founded claim that a defendant never acknowledged commission of the crime, because in light of a subsequent change in law he was never correctly informed of its elements, undermines confidence that the guilty plea represents a reliable basis for imposing a judgment of conviction. Accordingly, in this limited setting, we believe that a defendant may rely on later legal developments in contending that his guilty plea was not voluntary and intelligent in the constitutional sense.

c. Amicus acknowledges that "[f]or a plea to be voluntary, a defendant must receive 'real notice of the true nature of the charge against him.'" Br. 29 (quoting *Henderson* v. *Morgan*, 426 U.S. 637, 645 (1976) (quoting *Smith* v. *O'Grady*, 312 U.S. 329, 341 (1941))). He contends, however, that this requirement was satisfied on the facts of this case because the indictment charged, and the plea agreement stipulated, that petitioner "used" a firearm. Amicus Br. 32. There is no doubt that the indictment sufficiently charged an offense under Section 924(c) and that the plea agreement adequately stipulated to its commission. But there is equally no doubt that at the plea colloquy the district court advised petitioner that the use element was satisfied by "possession." J.A. 25 ("[The indictment] also charges you with possessing the firearms, during, in, and in relation to a drug trafficking crime."). *Bailey* makes clear that this

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States v. *Brown*, 117 F.3d 471 (11th Cir. 1997) (rejecting "then-existing law" and *Teague* arguments, and granting relief from a structuring guilty plea in light of this Court's later decision in *Ratzlaf*).

advice was incorrect. *Bailey*, 516 U.S. at 144 ("[A] conviction for 'use' of a firearm under § 924(c)(1) requires more than a showing of mere possession."). Accordingly, in the sense used by this Court in *Henderson*, petitioner was deprived of notice of the charge to which he entered a plea of guilty. And it is that deprivation of notice that gives rise to his constitutional claim.

3. Amicus agrees with us that petitioner defaulted his constitutional attack on his guilty plea and that he cannot show "cause" to excuse that procedural default. Br. 35-39. Amicus contends (Br. 40), however, that this Court's cases recognizing an "actual innocence" exception that allows consideration of a defaulted constitutional claim "do not apply to convictions premised on guilty pleas." This Court's decisions do not support the limitation suggested by amicus.[9] In *Schlup* v. *Delo*, 513 U.S. 298 (1995), this Court held that a claim of actual innocence serves as "a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits," *id.* at 315 (internal quotation marks omitted), but if such a showing is made, the "petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims." *Id.* at 316. Although *Schlup* involved a conviction after a trial rather than a conviction on a

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[9] Nor are we aware of any court of appeals so holding. To the contrary, the Eighth Circuit has considered whether a showing of "actual innocence" may justify consideration of a defaulted constitutional challenge to a conviction entered on a guilty plea. See *Weeks* v. *Bowersox*, 119 F.3d 1342 (8th Cir. 1997) (en banc) (entertaining, and rejecting on the facts, a claim that a defendant who pleaded guilty met the "actual innocence" test), cert. denied, No. 97-6846 (Jan. 26, 1998).

guilty plea, three points of analysis critical to the holding in *Schlup* are highly relevant here.

First, the Court was careful to distinguish between a free-standing claim of actual innocence, which presupposes an entirely error-free and fair trial and simply challenges the correctness of the result, on the one hand, and a "procedural" claim of actual innocence, on the other. 513 U.S. at 314. A "procedural" claim of innocence "does not by itself provide a basis for relief," but instead "depends critically" on the validity of underlying constitutional claims. *Id.* at 315. The showing of "actual innocence" in this context simply permits collateral review of the underlying claims, which would otherwise be barred by the unexcused procedural default. *Ibid.* Second, the Court made clear that, because there is an assertion of constitutional error, the "conviction may not be entitled to the same degree of respect as one * * * that is the product of an error-free trial." *Id.* at 316. Put another way, strong evidence of innocence may present a situation in which, "unless the court is also satisfied that the trial was free of nonharmless constitutional error, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims." *Ibid.* Third, the "actual innocence" gateway reflects the view that "[i]n appropriate cases, the principles of comity and finality that inform the concepts of cause and prejudice must yield to the imperative of correcting a fundamentally unjust incarceration." *Id.* at 320-321 (internal quotation marks omitted). "[C]oncern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system." *Id.* at 325. Thus, "we have consistently reaffirmed the

existence and importance of the exception for fundamental miscarriages of justice." *Id.* at 321.

Those features of the Court's analysis are equally applicable to a claim of the character presented here, *i.e.*, that a conviction obtained by a plea of guilty is constitutionally flawed because the defendant lacked "real notice of the true nature of the charge against him," *Henderson*, 426 U.S. at 645 (internal quotation marks omitted), and, that under a proper understanding of the law, the defendant is actually innocent. A guilty plea in this setting does not rule out the possibility of innocence. While the "actual innocence" exception has no application where guilt is "conceded," *Schlup*, 513 U.S. at 321 (quoting *Smith* v. *Murray*, 477 U.S. 527, 452 (1986) (plurality opinion)), a plea of guilty cannot operate as a true concession of guilt where, as alleged here, the defendant lacked "an understanding of the law in relation to the facts." *Broce*, 488 U.S. at 570 (quoting *McCarthy* v. *United States*, 394 U.S. 459, 466 (1969)). In this case, for example, petitioner's concession that he "used" a firearm provides no assurance that he actually did so, given that the district court defined "use" as possession, J.A. 25, and no facts were adduced at petitioner's plea hearing that indicated actual, active "use."[10]

Under these circumstances, it is possible that petitioner did not commit acts that satisfy all of the essential elements of a violation of Section 924(c). If

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[10] For that reason, while amicus is correct (Br. 43) to observe that claims of actual innocence made by a defendant who has pleaded guilty should be viewed with much skepticism in the ordinary case, that rationale does not apply with equal force where the underlying plea, evaluated in light of a proper understanding of the substantive law, did not constitute a complete admission of the elements of a crime.

such a showing is sustained, it is appropriate to regard petitioner as "actually innocent" of the Section 924(c) offense. That is not to say that petitioner has led a "blameless life." *Schlup*, 513 U.S. at 328 n.47. Even if the most that petitioner has done is to possess a firearm for protection in his drug trafficking, his conduct still exposes him to enhancement of his drug sentence. See Sentencing Guidelines § 2D1.1; *United States* v. *Watts*, 117 S. Ct. 633 (1997) (per curiam). But such an enhancement is not the sentence that petitioner received; rather, he sustained an independent conviction under Section 924(c). If petitioner did not carry or actively use his firearm, the five-year sentence he received for violating Section 924(c) is not supported by his guilt of that offense. And such a showing satisfies this Court's articulation of "actual innocence."[11]

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[11] Amicus suggests (Br. 45-46) that a showing that petitioner did not actively "use" a firearm would not support a claim of "actual innocence," but would at most amount to "legal innocence" or "technical innocence." That is incorrect. Under *Bailey*, mere possession of a firearm during and in relation to a drug offense does not satisfy the "use" element of the crime. If no more evidence existed than that, a showing of "actual innocence" would be established. See *Schlup*, 513 U.S. at 327 ("To satisfy the *Carrier* gateway standard, a petitioner must show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt."). Of course, the determination of actual innocence is not limited to the facts presented at a prior proceeding. Accordingly, a "technical" defect in the factual basis adduced at petitioner's guilty plea hearing would not satisfy his burden. Petitioner may not simply point to the guilty plea record in this case to establish his actual innocence. Even if those facts were legally insufficient, petitioner could not prevail unless he affirmatively offers credible evidence of his innocence, and all of the evidence, including that presented by the government, showed that petitioner indeed did no more than possess the firearm. *Id.* at 327-330. But if such a showing were made, it would satisfy the "innocence" standard applied in *Schlup*.

Claims of actual innocence in this context should remain the exceptional case, as *Schlup* envisioned. 513 U.S. at 321. As amicus correctly notes (Br. 42-43), petitioner is clothed with a "presumption of guilt," 513 U.S. at 326 n.42, and bears a significant burden to show that it is more likely than not that, under a proper legal standard, he did not "use" or carry a firearm. Gov't Br. 40-41; *Schlup*, 513 U.S. at 324 (requiring the defendant to adduce "new reliable evidence"). This is not a minimal showing. As this Court has recognized, "habeas corpus petitions that advance a substantial claim of actual innocence are extremely rare." *Schlup*, 513 U.S. at 321. Nothing in our submission suggests that prisoners may readily disavow their guilty pleas, deluge the courts with new-found claims of innocence, and assert entitlement to full-blown evidentiary hearings. We do not advance the view that a free-standing claim of actual innocence, without more, would entitle a defendant who pleaded guilty to enter the courthouse door and litigate his claim. Rather, as in *Schlup* itself, the actual innocence gateway lifts the bar of a default only where there is an underlying constitutional claim that the defendant presents.

In the context of a guilty plea, very few such constitutional claims exist, since a counseled and voluntary guilty plea forecloses virtually all attacks on the conviction based on antecedent constitutional

claims.[12] See *Broce*, 488 U.S. at 569; *Tollett* v. *Henderson*, 411 U.S. 258, 267 (1973). Thus, it should be the rare case in which a hearing is required or when relief is actually granted. Resolving those cases, of course, imposes a burden on the judicial system, for reconstructing the circumstances of the plea (and the underlying case) may prove difficult. Cf. *Parke* v. *Raley*, 506 U.S. 20, 31-32 (1992). The limited burden on the government and the trial courts in this instance, however, acknowledges the interest in avoiding continued confinement of a defendant who can establish that he is not guilty of a crime and whose conviction rests on harmful constitutional error. The redefinition of a federal crime through a narrowing judicial construction of its elements may generate a number of claims to relief that would not otherwise exist. But acceptance of the possibility of such claims reflects the premium placed on the avoidance of the "claimed injustice * * * [where] constitutional error has resulted in the conviction of one who is actually innocent of the crime." *Schlup*, 513 U.S. at 324; see *id.* at 333 (O'Connor, J., concurring) (*Schlup* standard "properly balances the dictates of justice with the need to ensure that the actual innocence

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[12] A petitioner would also have to comply with applicable statutory restrictions on the issuance of collateral relief, including those restrictions enacted in the AEDPA. See note 3, *supra*. We note that some courts of appeals have permitted claimants to seek collateral relief based on *Bailey* notwithstanding the AEDPA's generally applicable limitations on second or successive collateral motions. See *Triestman* v. *United States*, 124 F.3d 361 (2d Cir. 1997) (guilty plea); *In re Hanserd*, 123 F.3d 922 (6th Cir. 1997) (guilty plea); *In re Dorsainvil*, 119 F.3d 245 (3d Cir. 1997) (jury trial).

exception remains only a safety valve for the extraordinary case") (internal quotation marks omitted).

* * * * *

For the foregoing reasons and those stated in our principal brief, the judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

FEBRUARY 1998

No. 96-8516

In The

Supreme Court of the United States

October Term, 1997

KENNETH E. BOUSLEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

After the Petitioner's Brief was filed in this matter, Thomas C. Walsh was invited to brief and argue the case in support of the judgment below. 118 S. Ct. 463 (1997). Many of the contentions raised in Mr. Walsh's brief ("Amicus Br.") were neither argued by the government nor relied upon by the Eighth Circuit opinion. In particular, the Amicus now claims that Petitioner was accurately informed of the elements of § 924(c) as elucidated in *Bailey v. United States*, 516 U.S. 137 (1995) although the government has explicitly agreed that Bousley did not receive an accurate explanation of the gun charge.[1] *See* Amicus Br. 32-33; *cf.* U.S. Br. 22-29, U.S. Reply 5-6. In support of its new contention, the Amicus Brief materially distorts the record, and misstates Bousley's contentions and the holding in *Bailey*. Once these distortions have been swept aside, the Amicus's contention that Bousley's guilty plea should be immune from attack because it was voluntary must fail as well.

I. *TEAGUE* DOES NOT PRECLUDE THE APPLICATION OF *BAILEY* TO THIS CASE

The briefing explains in detail why *Teague v. Lane*, 489 U.S. 288 (1989) does not mandate refusal to apply *Bailey*'s interpretation of § 924(c) in this case. *See* U.S. Br. 18-21, U.S. Reply 1-5, ACLU Br. 14-17, NACDL/FAMM Br. 11-14. The Amicus Brief disagrees, but its arguments

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[1] The circuit court concluded that the holding in *Bailey* did not apply, because Bousley had "waived" his rights by pleading guilty. 97 F.3d at 287, 289.

actually show how unhelpful the *Teague* analysis is in resolving the issues in this case.

The court's powers are "judicial, not legislative in nature." *United States v. Mackey*, 401 U.S. 667, 697 (1971)(concurring opinion of Justice Harlan). This precept is at the core of *Teague*. Thus, when federal courts construe and apply substantive criminal statutes, they lack jurisdiction to engage in the legislative policymaking which the Amicus Brief argues for. *Compare* Amicus Br. 20-22 with U.S. Reply 2-3; *see also* U.S. Br. 15-16. Instead, the courts must look to the statutory language and to the intent of Congress. *Bailey v. United States*, 116 S. Ct. 501, 506-07 (1995). In short, the courts simply lack the power to rewrite § 924(c) in the manner suggested by the Amicus (at 29-30), so the statute said one thing at the time Bousley pled guilty, and another before and after.[2] *See United States v. Lanier*, 117 S. Ct. 1219, 1226 n. 6 (1997).

The Amicus Brief concedes (at 7) that the *Teague* limitations on retrospectivity apply only to new procedural rules. But although *Teague*'s restrictions apply only to retrospective application of new rules of constitutional procedure, 489 U.S. at 307, *quoting Mackey*, 401 U.S. at 692, the Amicus goes on to assume, without discussion, that *Teague's* limitations completely supplant the rules of

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[2] The government argues that the *Teague* rationale should be used to determine whether this court's rulings on procedural statutes ought to be retrospectively applied. U.S. Br. 19-20. While that issue is not before the Court in this case, it would seem that the normal rules of statutory construction ought to be the starting place for any court charged with interpreting and applying the enactments of Congress. *See Lindh v. Murphy*, 117 S. Ct. 2059 (1997).

statutory construction which apply to substantive federal criminal law. *See* U.S. Reply 2-5. Having assumed its way around the principal issue – viz., whether the *Teague* construct applies here at all – the Amicus Brief assumes without discussion that *Bailey* states a "new" rule of law, as that term is defined in *Teague*,[3] and then purports to find that the *Teague* rationale permits courts to disregard *Bailey*'s interpretation of § 924(c).

The Amicus Brief purports to consider whether the exceptions *Teague* announced to its general prohibition on retrospective application of new procedural rules would apply here. But this discussion actually shows how far afield the Amicus's analysis strays. *See* Amicus Br. 10-12. *Teague* states that "a new rule should be applied retroactively if it requires the observance of 'those procedures that . . . are "implicit in the concept of ordered liberty." ' " 489 U.S. at 311. Of course, this case involves substantive criminal law, not procedure, so naturally this *Teague* exception is "completely foreign to the issues presented here," (Amicus Br. 12).[4] Having thus observed that an

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[3] A rule is not "new" under *Teague*, if a lower court would have "felt compelled by existing precedent to conclude that the rule the defendant seeks was constitutionally required." *Lambrix v. Singletary*, 117 S. Ct. 1517, 1525 (1997). But contrary to the Amicus Brief's unstated assumption, *Bailey* itself makes clear that its outcome is based on familiar constitutional principles and well-settled rules of statutory construction. 116 S. Ct. 506-08. Thus, *Bailey* merely decided what § 924(c) had always meant, and "why the Courts of Appeals had misinterpreted the will of the enacting Congress." *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 513 n. 12 (1994).

[4] It is worth noting, however, that *Bailey* does directly implicate the accuracy of Bousley's conviction. Thus, under

apple is not an orange, the Amicus Brief has also demonstrated that the entire *Teague* analytical framework is inapplicable here.

The Amicus also claims (at 18-20) that cases decided since *Davis v. United States*, 417 U.S. 333 (1974) would permit the Court to ignore its holding in *Bailey* and apply some other construction of § 924(c) in determining whether Bousley's guilty plea was involuntary. In support, Amicus cites *Gilmore v. Taylor*, 508 U.S. 333 (1993), arguing that its holding is inconsistent with the result Bousley seeks here. But *Gilmore* involved errors in giving pattern jury instructions in state court, not a federal defendant who got materially inaccurate information about the charges he faced from the trial judge. The intervening change of law at issue in *Gilmore* spoke only to state procedures, not the substantive definition of a federal crime. It was not claimed in *Gilmore* that the instructions failed to accurately state the law with which the defendant was charged or that they somehow lessened the State's burden of proof below that constitutionally required by cases such as *In re Winship*, 397 U.S. 358 (1970). 508 U.S. at 335. *Davis*, in short, had no bearing on the issues in *Gilmore*, so it is unsurprising that *Davis* is not mentioned there. *See* U.S. Reply 3-4.

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both Justice Harlan's analysis of habeas corpus in *Mackey* and under the statutory grounds for motions made under § 2255, Bousley is entitled to relief. *See* NACDL/FAMM Br. 12; ACLU Br. 15 n. 22

II. BOUSLEY'S GUILTY PLEA IS INVALID BECAUSE IT WAS INVOLUNTARY

A. Petitioner has shown that his guilty plea was involuntary because he did not have a true understanding of the § 924(c) charge at the time he entered his guilty plea. The government agrees. U.S. Br. 22-29; U.S. Reply 5-6, 10-11. The Amicus claims, however, that Bousley did understand the charge because he knew that § 924(c) required "use" of a firearm. Amicus Br. 27, 28, 33. This line of argument relies on distortions of the record and a rationale that would eviscerate the Sixth Amendment right to be informed of the "nature and cause of the accusation."

The Amicus finds it significant that Bousley was told the name of the crime charged under Count II. Amicus Br. 32-33. But Bousley was not adequately advised before his guilty plea as to the true nature of the crime called "use of a firearm during and in relation to" drug trafficking. Merely telling the defendant the *name* of the crime does not reveal its true nature; the elements of the crime must be revealed accurately as well. *See, e.g., Henderson v. Morgan*, 426 U.S. 637 (1976), where the defendant knew he was charged with second degree murder, but not that conviction required proof of intent to kill. 426 U.S. at 649.

Bousley's plea agreement, the transcripts of change of plea hearing and the sentencing hearing, and Bousley's presentence investigation report all show that the gun charge (Count II) was treated by all the responsible parties as a possession offense. And as the government has noted, Bousley's guilty plea agreement is invalid not because he was unaware that he was charged with use of

a firearm during and in relation to drug trafficking, but because the elements of "use" were inaccurately explained to him. U.S. Reply 10-11.

Thus, the Amicus Brief strays from the real issue and picks words out of context when it states (at 32) that Bousley's "plea agreement stipulated that he had 'used' a firearm."[5] In fact, the plea agreement specifically explained that mere ownership and possession of guns near drugs possessed for sale amounted to "use" of firearms in violation of § 924(c),[6] a pronouncement clearly incompatible with *Bailey*. *See* 116 S. Ct. 507-08.

Equally wide of the mark is the Amicus Brief's reference to Bousley's supposed "conscious decision not to seek a jury determination of whether he 'used' a firearm." Amicus Br. 27. Since he was unaware that this charge required proof of active employment of the firearm,

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[5] Although the government concedes that the explanation of the § 924(c) charge was faulty, U.S. Reply 10-11, it too mischaracterizes the plea agreement. Thus, the government erroneously claims that "the plea agreement adequately stipulated to [the] commission" of an offense under § 924(c). U.S. Reply 10.

[6] The paragraph in the plea agreement that explains this count reads as follows:

> 2. The parties also agree that . . . the defendant knowingly used firearms during and in relation to a drug trafficking offense . . . . The following firearms were found in defendant's bedroom near the 6.9 grams of methamphetamine . . . *The defendant admits ownership and possession of these two guns. This conduct constituted a violation of Title 18, United States Code, Section* 924(c) [emphasis added]. (JA 8)

Bousley's purported jury waiver was obviously involuntary.

The government correctly points out that the trial judge told Bousley at the plea colloquy that the use element was satisfied by "possession." The amicus misquotes the trial judge and disagrees.[7] U.S. Reply 10. The Amicus Brief goes on to claim erroneously that Bousley's understanding that the gun count was a possession offense is based on an "isolated statement of the district judge at the Rule 11 colloquy." Amicus Br. 23 n. 7.[8] Here again, the Amicus Brief distorts the record and strays from the real issue. As noted above, the Plea Agreement recites that "ownership and possession" is enough to violate § 924(c), and the trial judge explicitly told Bousley he faced a charge based on "possession of a firearm" when she explained this charge (JA 25-28). Moreover, the

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[7] The Amicus falsely claims that at the change of plea hearing, the trial judge told Bousley that "if he wished to challenge whether he 'used' the guns, he would 'have to go to trial to do that'(JA 28)." Amicus Br. 28 n. 10. At the point cited in the Amicus Brief, the trial judge actually told Bousley that if he wished to contest "whether those firearms were related to your drug trafficking, you'd have to go to trial to do that." JA 28. The trial judge never uttered the words "use" or "used" in connection with the § 924(c) charge. JA 25-28.

[8] Here and in several other places, the Amicus Brief cites to Bousley's questions about the *relationship* of the weapons to the drug charges as somehow illustrating his understanding of the § 924(c) charge. *See, e.g.*, Amicus Br. 24 n. 7; 27-28 n. 10; 33. These mischaracterizations of the record ignore the crucial "active employment" element of § 924(c), which was *not* explained to Bousley or understood by him.

discussion of guns at the evidentiary hearing on September 26, 1990 is in terms of possession (JA 52, 59), and in the Presentence Report Bousley recites his understanding that he had pled guilty to "possession of firearms." (JA 37) The consistent theme in these proceedings is that § 924(c) was a possession crime. There is nothing which suggested to Bousley that the offense of "use" of a firearm included active employment of the guns as an element the government had to prove.

The Amicus Brief claims (at 27-28 n. 10) that Bousley's counsel was "aware long before petitioner filed his appeal that the proper interpretation of 'use' in § 924(c) was a significant issue in his case," citing correspondence between Bousley and his trial counsel. However, the content of those letters illustrates that Bousley was raising the same question he had broached at the change of plea hearing, namely whether his possession of the guns was related to the drug trafficking charge. *See* U.S. Reply 7 n. 4.

Finally, the Amicus Brief finds support for this line of argument in its claim (at 32) that *Bailey* "altered only the evidence necessary to sustain a conviction under § 924(c)." In one sense, of course, the Amicus Brief is correct: it takes different evidence to convict when the elements of the crime are different. *See Henderson v. Morgan*, 426 U.S. 637, 649 (1976). But it is absurd to maintain, as the Amicus Brief does (at 33), that *Bailey* affected only the "quantum of evidence" necessary to establish a violation of § 924(c). As *Bailey* itself points out, mere possession of a weapon is an act different in kind and quality from the "active employment" Congress intended to be reached by "use" under § 924(c). 116 S. Ct. at 507. A

greater quantum of evidence of possession does not show active employment of a firearm by any stretch of the imagination.

B. The government agrees with petitioner, that section 924(c) must be applied as written in determining the voluntariness of Bousley's plea. U.S. Reply 2-3. But the Amicus Brief asserts (at 29) that the voluntariness of a guilty plea must be "measured at the time it is entered." However, this standard is both unprincipled and unworkable, as this case and the Amicus Brief's own arguments illustrate.

The flaw in this argument is that it divorces the definition of federal crimes from statute, authorizing courts to look instead to common law definitions when determining whether a defendant has been informed of the true nature of the charges he faces. Not only does this approach violate settled precedent, *see United States v. Lanier*, 117 S. Ct. 1219, 1226 n. 6 (1997), without the essential statutory touchstone, courts and counsel would lack clear guidance on the elements of federal crimes.

In Bousley's case, for example, the Amicus Brief first claims (at 27) that at the time Bousley's plea was entered, "petitioner had indeed 'used' a gun as 'use' had then been interpreted." Later, however (at 39), the Amicus Brief argues that at the time of Bousley's plea, § 924(c) was the source of "much perplexity in the courts. The Circuits are in conflict. . . . " How then would a reviewing court determine whether Bousley was informed of the true nature of the charges against him? Indeed, under the Amicus Brief's argument, it seems clear that Bousley did not understand the nature of the charges he faced at the

time he entered his plea, for no one told him that there was "much perplexity" among the circuit courts as to what § 924(c) really meant. Having thus abandoned the statutory text and legislative history as the source of meaning for § 924(c), the Amicus Brief posits a rule which virtually guarantees inconsistency and confusion among courts and counsel alike.

The reasons the Amicus advances for this rule are repose and conservation of judicial resources. Amicus Br. 21-22; 47. But it is far from certain that the Amicus's "valid at the time entered" rule would preclude frivolous collateral attacks on guilty pleas or make the job of district judges considering § 2255 motions any easier. Indeed, the clarity and familiarity of the well-worn statutory construction approach which Bousley and the government espouse is at least as practical as the Amicus's proposed rule. Moreover, as the government points out, repose must be tempered with regard for the integrity of the judicial system and principled consistency of analysis. Where the offense to which the defendant has pled guilty turns out not to be a crime at all, the interest in repose must give way. This important result can only be obtained by applying § 924(c) consistently, which requires recognition that the *Bailey* decision controls this case. U.S. Reply 7-8.

The Amicus Brief's proposed rules reflect profound discomfort with the whole notion of collateral attack on guilty pleas.[9] But it is well settled that no procedural

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[9] Indeed, as the government has observed, the Amicus Brief appears to contend that any guilty plea which was "valid at the time entered" is invulnerable to attack, even if the criminal statute was unconstitutional. U.S. Reply 8-9.

device for the taking of guilty pleas is so perfect in design and exercise as to warrant a per se rule rendering it "uniformly invulnerable to subsequent challenge." *Blackledge v. Allison*, 431 U.S. 63, 73 (1977), *citing Fontaine v. United States*, 411 U.S. 213, 215 (1973). Petitioner does not argue that Section 2255 motions should be available for any defendant who merely proclaims his actual innocence, *cf. Herrera v. Collins*, 506 U.S. 390 (1993). Instead, Bousley clearly fits into that small class of defendants who have suffered constitutional wrongs, and for whom the Great Writ is the correct, indeed the only, remedy available.

III. BOUSLEY MUST BE PERMITTED TO PRESENT THE MERITS OF HIS CLAIM

A. Petitioner has explained that procedural default should not be an issue in this case. Pet. Br. 18-21, NACDL/FAMM Br. 14-21. The role of procedural default in § 2255 cases and the unique nature of the constitutional deprivation Bousley has suffered compel this result. In response, the government and the Amicus rely on cases which did not involve a defendant in federal court who was materially misled by the trial judge as to the elements of the charges he faced. Cases such as *Wainwright v. Sykes*, 433 U.S. 72 (1977), which involve the adequate and independent state ground doctrine and the principles of comity and federalism which limit review of state judgments where a federal claim has not been timely

raised, have little to say about this case. *See Trest v. Cain*, 118 S. Ct. 478 (1997).

Here, the trial court, the prosecutor and Bousley's attorney all misled him into believing that he would be convicted on the basis of "possession" of firearms.[10] There is no more profound constitutional deprivation than the one at issue here. Bousley was denied his Sixth Amendment right to know the nature of the charges he faced, induced to plead guilty when he was, in fact, innocent, and never advised of the true nature of the charges until long after his right to appeal had lapsed. Bousley raised this deprivation in this, his first and only § 2255 motion. He should not be defaulted for failing to raise it sooner.

B. Even if Bousley's claim is viewed as defaulted, it should be heard on its merits because he has established that cause exists for his failure to raise the Sixth Amendment deprivation issue on appeal. Pet. Br. 35-36. The government and the Amicus both claim that Bousley's arguments on this issue are grounded in a "futility" exception to the general notion of default. U.S. Br. 36; Amicus Br. 11. However, as explained here and in the prior briefing, Petitioner's argument is not merely that an appeal would have been futile. Pet. Br. 35-36, NACDL/FAMM Br. 21-22, ACLU Br. 22-23. Rather, cause is shown by the trial court's actions which deprived Bousley of his right to accurate information about the true nature of the charges he faced, *see Murray v. Carrier*, 477 U.S. 478, 488

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[10] As explained above, the "during and in relation to drug trafficking" element of the gun charge is not at issue in these proceedings.

(1986), *citing Brown v. Allen*, 344 U.S. 443, 486 (1953); and by the unanticipated result in *Bailey*. *Reed v. Ross*, 468 U.S. 1 (1984).

Thus, the government (U.S. Br. 35-36) and the Amicus's (Amicus Br. 37-38) reliance on *Engle v. Isaac*, 456 U.S. 107 (1982) is misplaced, because that case involved a state habeas petitioner who failed to challenge a self defense instruction in state court on federal grounds. This Court held that his claim that it was "futile" to raise this argument in state court was not a sufficient excuse for his failure to do so. *Id*. at 130. Here, however, Bousley did not consciously fail to argue the invalidity of his guilty plea because of perceived futility. He had been told by the trial court that he was charged with a possession crime, he thought he had pled guilty to a possession crime, JA 25-27, 37, and he had been specifically told by the trial court that the only thing he could appeal was his sentence. JA 21. These official actions also establish cause for Bousley's failure to raise his Sixth Amendment deprivation on direct appeal.

C. As the government has conceded, Bousley's strong showing of actual innocence affords him the right to present the merits of his constitutional claim, regardless of any procedural default. U.S. Br. 40-41; U.S. Reply 12-14. Misconstruing both the law and the facts, the Amicus Brief asserts (at 40-42, 45) that Bousley's actual innocence claim is based on "legal insufficiency,"; and (at 40-41) that Bousley's actual innocence and this Court's opinion in *Schlup v. Delo*, 513 U.S. 298 (1995) cannot be relied upon in this proceeding because Bousley's habeas petition attacks a guilty plea. Amicus is wrong on all of these points.

The Amicus Brief supplies precious little argument and cites no authorities for its proposition that different rules should apply to habeas petitions which attack an invalid guilty plea. The portions of *Schlup* the Amicus cites presuppose a valid guilty plea, not one which was involuntary. And section 2255 does not suggest that different rules apply to motions attacking judgments based on guilty pleas. If anything, a defendant who has entered a guilty plea which is otherwise subject to valid collateral attack has even greater entitlement to the narrow escape path explained in *Schlup* than defendants convicted after a trial, for such a defendant has been induced to forfeit all of his constitutional procedural rights. If he can make the requisite showing of innocence, he is entitled to show the constitutional infirmity in his guilty plea. *See* U.S. Reply 11-15.

The Amicus's overblown rendition of the relief Bousley seeks simply does not match either the facts or the issues before this court. Amicus Br. 46. The undisputed facts in this record establish Bousley's actual innocence of the gun charge. The charges against Bousley stemmed from his arrest while authorities were executing a search warrant. The guns were stored in the headboard of the bed, one of the prototypical examples described in *Bailey* as possession that does not violate § 924(c). 116 S. Ct. at 508. To establish active employment, the government would have to contradict these facts.[11] How "jailhouse writ writers" will be able to establish such a

[11] Neither the government nor the Amicus cites any authority for their suggestions that if Bousley is successful here, his case should be remanded so he could be indicted on new charges never before alleged, such as the "carry" prong of

constitutional violation with a "minimal showing," the Amicus does not say. Moreover, the Amicus has confused the actual innocence gateway with the constitutional showing necessary to obtain relief. Amicus Br. 46.

Thus, contrary to the implications in the Amicus Brief, Bousley's claim is not based on a free standing claim of innocence. Amicus Br. 46; *cf. Herrera v. Collins*, 506 U.S. 390 (1993). Instead, the trial court record reveals the violation of Bousley's Sixth Amendment right to be informed of the true nature of the charges he faces. Bousley merely asks that the same rules of process and substance be applied to his case as are applied in any federal habeas case.

IV. BOUSLEY'S NARROW AND UNUSUAL CLAIM FOR COLLATERAL RELIEF SHOULD BE GRANTED, BECAUSE IT IS BASED UPON A CONSTITUTIONAL DEPRAVATION WHICH UNDERMINES THE RELIABILITY OF HIS GUILTY PLEA

A. Bousley's petition establishes that his imprisonment is wrong, because the trial judge inaccurately explained the elements of the criminal charge to him, his conduct was never made criminal by statute, and he raised his claim at the first opportunity to fully and fairly present it. The Amicus Brief claims (at 21), however, that

§ 924(c). *See* U.S. Br. 41-42; Amicus Br. 49 n. 21. While the remedies in the event of remand are not squarely before the Court, it should be noted that the government and the courts are the ones who erred in obtaining Bousley's erroneous conviction under § 924(c).

permitting collateral attack "every time the reach of a federal criminal statute is narrowed" would result in a "flood of habeas petitions." History is against this argument, though, for cases involving the kind of narrowing at issue here are rare, and post conviction machinery has not been "disabled" when § 2255 motions have followed them. *See* NACDL/FAMM Brief at 8-9.

Equally inaccurate is the Amicus Brief's reliance (at 22-23) on the supposed "give-and-take of plea bargaining" which preceded Bousley's guilty plea. In fact, there was no charge or sentence bargaining at all in this case; Bousley simply pled guilty to the charges in the indictment. JA 9. The only thing the government claims to have given up in reliance on the § 924(c) charge is an appeal of Bousley's sentence.[12] U.S. Br. 9 n. 6. But this post-hoc justification is specious. Neither the government nor the Amicus suggests any ground the government could have used in an appeal from the district court's factual findings on drug quantity. And Bousley's appeal of his sentence would certainly have triggered a cross-appeal, had there been any legal ground for one. In sum, the government gave up virtually nothing in return for Bousley's guilty plea to a non-existent crime.

[12] Significantly, the Eighth Circuit did not rely on this argument, although the government made it below.

CONCLUSION

For the reasons stated above, in Petitioner's Brief and in the briefs of the United States, the ACLU and NACDL/FAMM, Petitioner respectfully requests that the judgment of the Eighth Circuit Court of Appeals be reversed, and that the case be remanded with directions to reverse the judgment of the district court dismissing Bousley's Petition for Writ of Habeas Corpus, and to order that the district court enter a new and different order and judgment setting aside Bousley's plea of guilty plea on Count II of the indictment which charged violation of § 924(c), and dismissing Count II with prejudice.

Respectfully submitted,

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February 1998

No. 96-8516

NOV 12 1997

CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

KENNETH E. BOUSLEY,

Petitioner,

—v.—

JOSEPH M. BROOKS,

Respondent.

ON WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. In support of those principles, the ACLU has appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae*. Because this case involves the continued imprisonment of someone based on an acknowledged misinterpretation of the law, it raises issues of fundamental importance to the ACLU and its members.

STATEMENT OF THE CASE

The petitioner, Kenneth E. Bousley, is a federal prisoner now in the custody of the Federal Bureau of Prisons. In 1990, he pled guilty to a charge of "using" a firearm "during and in relation to" a drug offense within the meaning of 18 U.S.C. §924(c). He is now serving a five-year term pursuant to §924(c).

At the time of Mr. Bousley's conviction, the lower courts understood that a defendant could be convicted for "using" a firearm under §924(c) if the defendant possessed a gun for protection during a drug transaction. Mr. Bousley admitted that he had stored firearms on the premises where he was arrested for drug offenses. He was led to believe that, on the basis of those facts, he was guilty of the §924(c) "using" offense. His appeal on other issues was unsuccess-

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part and no person, other than *amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

ful. *United States v. Bousley*, 950 F.2d 727 (8th Cir. 1991).

In 1994, Mr. Bousley filed a *pro se* habeas corpus petition attacking his plea to the §924(c) "using" charge on the ground that the plea was not supported by an adequate factual record. The district court treated that petition as Mr. Bousley's initial motion to vacate sentence pursuant to 28 U.S.C. §2255, and denied relief. While Mr. Bousley's appeal from that judgment was pending, this Court held in *Bailey v. United States*, 516 U.S. __, 116 S.Ct. 501 (1995), that a defendant "uses" a firearm within the meaning of §924(c) only if he actively employs a gun to perpetrate a drug crime. The circuit court appointed counsel to brief the effect of *Bailey*, but ultimately held that Mr. Bousley had waived any claim based on the new and authoritative interpretation of §924(c) by pleading guilty and failing to challenge the factual basis of his plea on direct review -- five years before *Bailey* was decided. This Court granted *certiorari*.

SUMMARY OF ARGUMENT

Something important is at stake in this case. On the surface, the question is whether a federal prisoner may have access to the federal courts to attack a criminal judgment collaterally. More fundamentally, the question is whether the federal government can continue to imprison a man after it has been established that the statute under which he was convicted and sentenced does not reach the behavior in which he engaged. Under the most basic principles of due process, the government must justify depriving any person of liberty. In this instance, the government has no legitimate penal justification for imposing a criminal penalty on a man for a crime he did not commit.

The government may fairly ascribe Mr. Bousley's original sentence to an honest (though seriously mistaken) construction of §924(c). Now, however, in light of this Court's authoritative construction of that statute in *Bailey*, it is clear on the face of the extant record that Mr. Bousley is *legally innocent* of the offense of which he was convicted and is thus serving a sentence for which he is *legally ineligible*.

The *Bailey* decision overruled an interpretation of §924(c) that had been accepted by every circuit court at the time of Mr. Bousley's guilty plea and that he reasonably regarded as controlling. The applicability of *Bailey* in this §2255 action therefore turns on the nature and function of the §2255 motion remedy. The primary function of that remedy is to authorize the same federal judge who handled earlier phases of a federal prisoner's case to cure precisely this kind of error, in reliance on the files and records already available.

This Court held in *Davis v. United States*, 417 U.S. 333 (1974), that a district court entertaining a §2255 motion from a federal prisoner must give effect to a new interpretation of federal criminal law if it reveals that the prisoner is legally innocent. In light of this Court's decision in *Bailey*, Mr. Bousley was convicted and sentenced for behavior that §924(c) does not count as "using" a firearm. The sentencing court's erroneous construction of §924(c) produced the unauthorized sentence that Mr. Bousley is now serving. Accordingly, that sentence is subject to attack in this §2255 proceeding.

The point of *Davis* is equally the point of this Court's recent decisions regarding the availability of federal collateral relief. The government is entitled to imprison offenders whose behavior Congress, in its wisdom, has made a federal crime. But the government has no legitimate interest in confining a man whose conduct Congress has not condemned. Even assuming that the government may have an interest in defending a prison sentence in a case in which a

collateral challenge would require an evidentiary hearing, the government has no legitimate interest in preserving a sentence that is plainly unlawful in light of the record already in place.

Nothing this Court failed to decide in *Davis* undercuts the force of that precedent in this case. Nor does this Court's decision in *Teague v. Lane*, 489 U.S. 288 (1989), have implications here. The doctrine in *Teague* deals with the availability of new rules of *constitutional criminal procedure* (not new interpretations of federal substantive criminal law) in §2254 habeas corpus proceedings (not §2255 proceedings) involving *state* (not federal) prisoners. *Teague* adjusts federal/state relations and protects the finality of state criminal judgments. In this §2255 case, by contrast, a district court is charged with implementing the federal criminal law policies that Congress has selected.

Mr. Bousley's plea of guilty does not foreclose his claim. Because he was mistakenly led to believe that he could be convicted even though he had not actively employed a firearm, he was in no position to admit his guilt under §924(c), properly construed.

ARGUMENT

I. A DISTRICT COURT ENTERTAINING A FEDERAL PRISONER'S §2255 MOTION TO VACATE A SENTENCE IMPOSED UNDER 18 U.S.C. §924(c) MUST GIVE §924(c) THE CONSTRUCTION THIS COURT GAVE THAT STATUTE IN *BAILEY*

This case requires the Court to visit, for the first time in many years, the institutional framework Congress has established for ensuring that *federal* criminal offenders serve only the sentences that Congress has prescribed in federal *substantive* criminal statutes.

This Court's decision in *Bailey* rejected the construction the lower courts had previously placed on §924(c) and, in so doing, effectively overruled every lower court precedent on point.[2] The *Bailey* decision, accordingly, gave rise to the question here: whether a district court entertaining a §2255 motion by a prisoner who was convicted and sentenced prior to *Bailey* can ignore *Bailey*'s authoritative construction of §924(c), resuscitate the erroneous construction the court employed previously, and dispose of the prisoner's claim on that basis. Mr. Bousley's petition for *certiorari* refers to this question as whether *Bailey* is "retroactively" applicable to this case. *See* Petition for *Certiorari* at i.

This Court has already remanded a number of cases in light of *Bailey*.[3] The prisoners in those cases had all been convicted and sentenced before *Bailey* was decided, but nonetheless sought appellate relief on the basis of *Bailey*'s construction of §924(c). If Mr. Bousley's case is different, it can only be because he advances his claim in a §2255 motion. In this context, however, that distinction is not meaningful, and the precedent established in *Bailey* is fully applicable. The record in this case establishes that Mr. Bousley is legally innocent and is thus entitled to the relief he seeks. The lower courts have held as much in similar

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[2] The Solicitor General's brief in *Bailey v. United States* accurately informed the Court that the circuits had "uniformly" construed §924(c) to reach mere possession of a firearm for the "protection" of drug transactions. Brief for the United States, at 32 & n.12 (citing illustrative lower court decisions).

[3] *E.g.*, *Fuentes v. United States*, 516 U.S. __, 116 S.Ct. 663 (1995). *See Thomas v. American Home Products*, __ U.S. __, __, 117 S.Ct. 282, 283 (1996)(Scalia, J., concurring).

cases, and this Court should reach the same conclusion.[4]

A. The §2255 Motion Remedy

As Justice Harlan explained, collateral review cases present a choice of law question that direct review cases do not. The answer to that choice of law question in any given case turns on the "nature, function, and scope of the adjudicatory process" in which the case arises.[5] In this instance, the adjudicatory device on which Mr. Bousley and similarly situated litigants rely is a motion to vacate sentence pursuant to 28 U.S.C. §2255. The enforceability of the *Bailey* decision in a §2255 proceeding is, accordingly, a function of the nature and purpose of that motion remedy.

At a minimum, §2255 provides prisoners attacking federal convictions and sentences with a modern remedy (in the sentencing court) that is "exactly commensurate" with the remedy that habeas corpus had previously supplied (in a court near the prisoner's place of confinement).[6] Yet, that is hardly all that §2255 contributes to the federal criminal justice system. In addition to substituting for habeas corpus, §2255 also restates, clarifies, and simplifies "the procedure

[4] *E.g.*, *Stanback v. United States*, 113 F.3d 651 (7th Cir. 1997); *United States v. Barnhardt*, 93 F.3d 706 (10th Cir. 1996); *United States v. Garcia*, 77 F.3d 274 (9th Cir. 1996); *United States v. Thompson*, 122 F.3d 304 (5th Cir. 1997). Indeed, the Eighth Circuit below did not refuse to apply *Bailey* because Mr. Bousley advanced his claim via a §2255 action, but rather for the "distinct" reason that, in the circuit court's view, Mr. Bousley had committed procedural default by failing to anticipate *Bailey* at trial or on direct review. *Bousley v. Brooks*, 97 F.3d 284, 287 n.2 (8th Cir. 1996).

[5] *Mackey v. United States*, 401 U.S. 667, 682 (1971)(Harlan, J., concurring & dissenting).

[6] *Hill v. United States*, 368 U.S. 424, 427 (1962).

in the nature of the ancient writ of error coram nobis."[7] A §2255 motion thus constitutes "a further step in the movant's criminal case"[8] at which the district court is empowered to explore and determine whether a movant's sentence was imposed "without jurisdiction" or took a form "not authorized by law." If the court reaches a judgment favorable to the prisoner, it is obliged not only to "set aside the judgment and to discharge the prisoner" if that form of relief is warranted, but also to "resentence" the prisoner or to "correct" his sentence where appropriate.[9]

The §2255 motion remedy differs in important respects from the habeas corpus remedy, codified in 28 U.S.C. §2254, for state prisoners challenging custody at the hands of state authorities. In a habeas corpus action under §2254, a federal district judge comes fresh to a state prisoner's case, develops the material facts according to statute and this Court's precedents, and then reexamines (in the special manner of habeas corpus) the judicial actions previously taken by state courts. Habeas corpus thus has implications for federal/state relations and can contribute to tensions between the two systems. In a §2255 action, by contrast, the same district court judge who handled the earlier phases of a federal convict's case considers and corrects his or her own errors -- typically on the basis of the "files and records of the case" already before the court. 28 U.S.C. §2255.

In enacting §2255, accordingly, Congress has not merely located a habeas remedy in a more convenient forum.

[7] 28 U.S.C. §2255 (revision note); *accord United States v. Morgan*, 346 U.S. 502, 505-06 n.4 (1954)(stating that coram nobis and §2255 are of the "same general character").

[8] Advisory Committee Note to §2255 Rule 1, quoting S. Rep. No. 1526, 80th Cong., 2d Sess. 2 (1948).

[9] *Id.*, quoting 28 U.S.C. §2255.

Congress has extended federal criminal cases to a post-judgment proceeding at which special attention is paid to the validity of the sentences imposed on federal offenders. The choice of law question in this case must be resolved with these singular features of the §2255 remedy in view.

B. The Decision In *Davis v. United States*

This Court held in *Davis v. United States*, 417 U.S. 333, that a district court entertaining a §2255 motion by a federal prisoner must give effect to an "intervening change in substantive law" when that change reveals that the prisoner is *legally innocent* of the offense of which he was convicted and thus is *legally ineligible* for the sentence he has been ordered to serve.

The Court explained in *Davis* that the §2255 motion remedy is available to cure "fundamental" defects in federal criminal sentences -- defects which, if uncorrected, result in "a complete miscarriage of justice." 417 U.S. at 346. A miscarriage of justice occurs, in turn, when a new interpretation of the statute under which a defendant was convicted reveals that he was convicted "for an act that the law does not make criminal." *Id.* at 346-47.[10] This only makes sense. In such a case, it was the very misunderstanding of the governing statute which actually produced the prisoner's invalid sentence in the first place.

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[10] The Court embraced the "fundamental defect" formulation as a general threshold for the constitutional and nonconstitutional claims that are cognizable in a §2255 proceeding, irrespective of whether a novel proposition of federal substantive law is invoked to expose such a defect. The Court was perfectly clear, however, that when a change in federal substantive criminal law discloses a "fundamental defect" a district court entertaining a §2255 motion must give effect to it. 417 U.S. at 334 (explaining that the *Davis* case involved "the availability of collateral relief from a federal criminal conviction based upon an intervening change in substantive law").

The focus in *Davis* on legal innocence comports with more recently developed doctrines governing the availability of federal collateral relief. This Court has reminded litigants and lower courts alike that the point of criminal justice is to distinguish the guilty from the innocent and that collateral review must reflect that premise.[11] Indeed, when a prisoner shows that he has been given a sentence for which he is *legally ineligible*, the Court has held that even a *successive* petition may be employed to ensure that such a sentence is corrected.[12]

These principles control this case. Mr. Bousley alleges that he did not actively employ a firearm in connection with a drug offense. That claim is plainly sustained by the record. Inasmuch as *Bailey* has now authoritatively held that active employment of a gun is an essential element of the §924(c) "using" offense, Mr. Bousley is legally innocent of that offense. If the sentencing court's misconstruction of §924(c) were not responsible for Mr. Bousley's current detention, this might be a different case. Yet precisely *that error* in *this* case renders the sentence Mr. Bousley is now serving open to attack in a §2255 action.[13]

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[11] *E.g.*, *O'Neal v. McAninch*, 513 U.S. __, __, 115 S.Ct. 992, 997 (1995)(explaining that the "basic purposes" of the writ of habeas corpus include reducing the risks that the outcome of trials will be unreliable and that "innocent" citizens will be condemned by mistake); *Murray v. Carrier*, 477 U.S. 478, 496 (1986)(explaining that ordinary rules governing procedural default must give way when it appears that one who is "probably" innocent has nonetheless been convicted).

[12] *Sawyer v. Whitley*, 505 U.S. 333 (1992).

[13] On the basis of the same principles, the lower courts have applied this Court's decisions in *Welsh v. United States*, 398 U.S. 333 (1970); *United States v. Maze*, 414 U.S. 395 (1974); *McNally v. United States*, 483 U.S. 350 (1987); and *Ratzlaf v. United States*, 510 U.S. 135 (1994), in §2255 actions involving convictions and sentences already final at the

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It is hardly surprising that a district court must give effect to an interim change in federal substantive law that reveals a prisoner's legal innocence. Such claims approximate the claims this Court began to entertain in federal habeas corpus cases in the latter part of the nineteenth century. At that time, the Court typically stated that habeas was limited to testing criminal convictions for "jurisdictional" error. But, as Justice Harlan explained, the Court gradually forged an "expansion of the definition of jurisdiction" in cases in which prisoners were convicted under invalid statutes or sentenced to serve a prison term that "the governing statute" did not permit.[14] Professor Bator, too, found it significant that the Court relaxed the limits on habeas corpus in these and similar circumstances -- well in advance of modern developments.[15]

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[13] (...continued)
time those decisions were handed down. *E.g.*, *United States v. Fargnoli*, 458 F.2d 1237 (1st Cir. 1972)(*Welsh*); *Strauss v. United States*, 516 F.2d 980 (7th Cir. 1975)(*Maze*); *Ingber v. Enzor*, 841 F.2d 450 (2d Cir. 1988)(*McNally*); *United States v. Brown*, 117 F.3d 471 (11th Cir. 1997)(*Ratzlaf*).

[14] *Fay v. Noia*, 372 U.S. 391, 451 (1963)(Harlan, J., dissenting), citing *Ex parte Siebold*, 100 U.S. 371 (1879), and *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873).

[15] Paul M. Bator, "Finality in Criminal Law and Federal Habeas Corpus for State Prisoners," 76 Harv.L.Rev. 441, 466-74 (1963). Neither Justice Harlan nor Professor Bator proposed that the nineteenth century precedents paint a perfectly coherent and consistent picture of the writ's availability in that period. Nor did they explicitly anticipate the question presented in this case and state that the Court in the *Siebold* and *Lange* period would have found Mr. Bousley's claim cognizable. Yet Justice Harlan and Professor Bator did identify a number of precedents indicating that this is the kind of claim that the Court's emerging analysis would have found appealing. Professor Bator explained, for example, that in *Siebold* the Court assumed that "the acts charged in the indict-
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C. What *Davis* Failed To Decide

Nothing this Court *failed* to decide in *Davis* undermines what the Court plainly *did* decide. A selective service board had declared Davis delinquent. Thereafter, the board accelerated his induction into the Armed Services. When he did not report, he was prosecuted. While his appeal was pending, this Court decided in *Gutknecht v. United States*, 396 U.S. 295 (1970), that it was unlawful for a selective service board to accelerate a registrant's induction as a penalty for delinquency. The circuit panel handling Davis' appeal remanded the case to the district court for reconsideration in light of *Gutknecht*.

The district court held a hearing, concluded that Davis' induction had not in fact been accelerated because of his delinquent status, and reaffirmed his conviction. Davis appealed that judgment and, when the court of appeals affirmed the district court, he sought *certiorari* in this Court. While that petition was pending, another panel in the same circuit held in a separate case, *United States v. Fox*, 454 F.2d 593 (9th Cir. 1971), that, in light of *Gutknecht*, a registrant ordered to report for induction as a delinquent was subject to accelerated induction as a matter of law, irrespective of any evidence that the board had not actually expedited his induction on that basis. Accordingly, the panel in *Fox* concluded that the registrant in that case, like the regis-

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[15] (...continued)
ment were in fact forbidden by the statute" and, on that basis, reached the further question whether the statute was constitutional. Bator, *supra* at 468 n.61. In Bator's view, the "wisdom" of handling the case in that way was questionable, thus intimating that the Court may actually have been feeling its way toward a wider purview for habeas corpus that would avoid unnecessary constitutional questions by focusing on ostensibly nonconstitutional questions of statutory construction. *Id.*

trant in *Gutknecht*, could not be prosecuted.[16]

After this Court denied *certiorari*, Davis filed a §2255 motion in which he contended that *Fox* constituted a change in the relevant substantive law, which (if applied to his case) revealed that he had been erroneously prosecuted, convicted, and sentenced. This Court ultimately granted review of the case in that posture in order to overturn the circuit's dismissal on the basis of the "law of the case" doctrine. Since the circuit court below had not passed on the merits of Davis' claim, this Court had no occasion itself to address that claim and thus no occasion to consider whether *Fox* was correct in deciding that delinquent registrants suffered accelerated induction as a matter of law.[17] For the same reason, this Court had no occasion to decide whether *Gutknecht* had "retroactive application."[18]

Neither of those reservations affects the force of the Court's decision in *Davis* -- namely, that a district court entertaining a §2255 motion must address a prisoner's claim that a new interpretation of the statute he was convicted of

[16] According to the panel in *Fox*, the board could decide whether to accelerate a registrant's induction only if the registrant was first declared delinquent. Any discretionary decision actually to call a registrant early was traceable to the registrant's delinquency status and thus constituted an unauthorized penalty for delinquency.

[17] *Davis*, 417 U.S. at 341 n.12.

[18] *Id.* In 1974 when *Davis* was decided, this Court had not yet announced that its decisions, however novel, are always applicable to criminal cases still in the appellate pipeline. That is why it was intelligible then (though it would not be today) to treat the applicability of *Gutknecht* in *Davis* as a theoretically open question. While Davis had originally been convicted and sentenced prior to *Gutknecht*, his appeal was pending at the time of this Court's decision in that case.

violating reveals that he is legally innocent.[19] Having disclaimed a forthright decision on whether *Fox* had correctly construed the statute (and *Gutknecht*), the Court assumed for purposes of its decision that *Fox* had understood the statute (and *Gutknecht*) accurately and that Davis' claim based on *Fox* was valid:

> [Davis'] contention is that the decision in *Gutknecht* . . . as interpreted . . . in *Fox* . . . establishes that his induction order was invalid . . . and that he could not be lawfully convicted for failure to comply with that order. *If this contention is well taken*, then Davis' conviction and punishment are for an act that the law does not make criminal. There can be no room for doubt that such a circumstance "inherently results in a complete miscarriage of justice" and "present[s] exceptional circumstances" that justify collateral relief under §2255. Therefore, *although we express no view on the merits of the petitioner's claim, we hold that the issue he raises is cognizable in a 2255 proceeding.*

417 U.S. at 346-47 (emphasis added).

[19] The holding in *Davis* on the basis of the facts in that case renders a similar result here irresistible. In *Davis*, the change in the law the Court assumed to have occurred came about by means of a more recent decision by a different panel of the same circuit court. That panel decision was not formally authoritative (as against the previous panel's decision) in the way that an *en banc* decision would have been or, of course, in the way that a decision from this Court necessarily must be. Here, then, Mr. Bousley seeks to enforce a far more authoritative new principle of federal criminal law than the one the Court had "no doubt" the prisoner in *Davis* could advance.

D. The Relevance Of *Teague*

Nor do this Court's recent cases beginning with *Teague v. Lane*, 489 U.S. 288, undercut either the authority of *Davis* or its persuasive analysis of the issue here. The *Teague* doctrine addresses the quite different problems attending the enforcement of federal constitutional *procedural* requirements in *state* criminal cases by means of federal habeas corpus pursuant to 28 U.S.C. §2254. In that context, the Court held in *Teague* that novel rules of *constitutional procedure* are enforceable in federal habeas proceedings only in exceptional instances. *Teague* is not on point here -- for three related reasons.

First, *Teague's* general policy regarding the application of new procedural safeguards is expressly focused on cases in which state §2254 petitioners seek habeas corpus relief. The lower courts have concluded that *Davis* rather than *Teague* governs cases (like this one) in which federal §2255 petitioners advance new rules of substantive criminal law.[20]

Second, within the §2254 context in which it resides, the *Teague* doctrine prescribes the consequences of new rules of criminal *procedure*, not new understandings of the *substance* of criminal offenses.[21] *Teague* thus affects the guilt-determination function in criminal cases only indirectly. By contrast, a new construction of a criminal statute specifies the behavior the statute morally condemns and thus makes it possible to talk intelligibly about who is guilty and who is innocent. A prisoner who was convicted and sentenced without benefit of a procedural rule that would have enhanced the chances of finding the facts accurately *may* be innocent. A prisoner who was convicted and sentenced for conduct that a new interpretation of the substantive statute shows not to be covered *is* innocent. His behavior has not been denounced as criminal. This is Mr. Bousley's claim in this case. No state prisoner in any of the *Teague* cases made, or could have made, the same claim or anything like it.

The focus on procedure in *Teague* is hardly surprising. Prisoners challenging state convictions are not in a position to *have* claims arising from substantive federal criminal law, but almost always contend that state statutes have been enforced in a way that violates federal procedural standards. In §2255 cases, by contrast, substantive claims regarding the meaning of federal statutes can easily arise. This accounts for the existence of *Davis*, itself a §2255 case, which has long guided the lower courts in determining the effect of changes in federal substantive law.[22]

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[20] *See* cases cited in note 4 *supra*. *Cf. Ianniello v. United States*, 10 F.3d 59, 63 (2d Cir. 1993)(Lumbard, J.)(noting that "the *Teague* line of cases does not purport to affect the holding in *Davis*").

[21] *See Ingber v. Enzor*, 841 F.2d at 454 n.1 (drawing this distinction); *accord United States v. Woods*, 986 F.2d 669, 676-77 (3d Cir. 1993) (Becker, C.J.); *Chambers v. United States*, 22 F.3d 939, 943 (9th Cir. 1994)(Kaufman, J.), *vacated*, 47 F.3d 1015 (9th Cir. 1995). *Cf. Robinson v. Neil*, 409 U.S. 505, 508-09 (1973)(recognizing that "[guarantees] that do not relate to [the procedures for conducting trials] cannot be conveniently lumped together" with procedural rules for "retroactivity" purposes).

[22] Even so, the new rule of substantive law announced in *Bailey* approaches the kinds of new rules that *Teague* would allow a state prisoner to advance in a §2254 action. The Court made it clear in *Teague* that even a new procedural rule is available in habeas if, in its absence, "the likelihood of an accurate conviction is seriously diminished." *Teague*, 489 U.S. at 313. That concern for protecting innocent citizens plainly resonates with the claim that Mr. Bousley seeks to advance here. Moreover, *Teague* also recognized that some new rules going to substance are also available in habeas corpus, notwithstanding *Teague's* general policy that new procedural rules are usually unenforceable. Specifically, *Teague* explained that a novel rule is applicable in habeas proceedings if it "places certain kinds of primary, private individual conduct beyond the

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Third, inasmuch as *Teague* focuses on habeas corpus petitions by *state* prisoners, that doctrine does not attend to the relative roles of the executive and judicial branches of the federal government, on the one hand, and the legislative branch, on the other. *Teague's* primary purpose is to mitigate friction between the federal courts and the courts of the states.[23] Denying the applicability of a new procedural rule in a federal habeas proceeding involving a state prisoner thus touches federalism, but has nothing to do with the separation of powers. By contrast, denying the application of an innovative construction of a federal criminal statute in a §2255 proceeding initiated by a federal prisoner has everything to do with the separate spheres occupied by the three branches of the national government.

Congress alone is empowered to fashion substantive criminal law. If prosecutors and courts misconstrue a criminal statute to impose a penalty on behavior that is beyond its reach, they compromise the fundamental allocation of

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[22] (...continued)
power of the criminal law-making authority to proscribe." *Id.* at 307, quoting *Mackey v. United States*, 401 U.S. at 692 (Harlan, J., concurring & dissenting). In *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989), the Court added that a prisoner can also rest on a new rule if it prohibits "a certain category of punishment for a class of defendants because of their status or offense." Since the Court was not focused on federal prisoners who might assert claims arising from shifts in the meaning of federal statutes, the *Teague* and *Penry* descriptions of the kind of new substantive rule that is available in §2254 habeas proceedings did not map perfectly on the cases that *Davis* had previously addressed. Yet the basic idea is the same. A prisoner can enforce a new rule if it demonstrates that his conduct did not fall within the ambit of the substantive criminal statute under which he was convicted and sentenced. *Cf. Gilmore v. Taylor*, 508 U.S. 333, 345 (1993)(holding that a new rule did not fit the *Teague* exception because it did not "'decriminalize' any class of conduct").

[23] *Stringer v. Black*, 503 U.S. 222, 227-28 (1992).

criminal law policy-making to the legislative branch. This Court exercises judicial judgment both with respect to the constitutional procedures by which criminal cases are conducted and with respect to the substantive criminal law being enforced. In the former instance, however, the Court has primary responsibility for elaborating the basic law. In the latter the Court's function is to effectuate the moral judgment made by Congress when the criminal statute was originally enacted. A decision that identifies the substantive prerequisites for criminal punishment under a statute, however "new" it may be as a practical reality, is nonetheless a vindication of a preexisting legislative policy.

II. A FEDERAL PRISONER'S PLEA OF GUILTY DOES NOT FORECLOSE A §2255 MOTION TO VACATE AN ERRONEOUS §924(c) SENTENCE IF THE PRISONER WAS LED TO BELIEVE THAT HE COULD BE CONVICTED AND SENTENCED UNDER §924(c) WITHOUT PROOF THAT HE ACTIVELY EMPLOYED A FIREARM

There is no justification for limiting *Bailey* claims to prisoners whose lawyers argued, in advance of *Bailey*, that "use" of a firearm meant its active employment. Precluding *Bailey* claims on a default theory would be indefensible in principle and utterly capricious in practical effect. It would honor §924(c) only in the breach. It would hypothesize a class of deserving prisoners that simply does not exist. And it would consign Mr. Bousley to serve a five-year sentence even though he clearly can show, *on the basis of the extant record in this case*, that he is legally innocent.

The very point of holding *Bailey* to be applicable to cases that were processed previously is to vindicate Congress' policy judgment regarding who is to be punished

under §924(c). It hardly would make sense, then, to make *Bailey* enforceable only hypothetically. Yet that is precisely what limiting *Bailey* to prisoners whose lawyers anticipated this Court's decision would accomplish. None of the prisoners in any of the reported *Bailey* cases claims to have pressed the "active employment" construction of §924(c) prior to *Bailey*. The class of litigants who did that is almost certainly a null set.

Even if a few such prisoners exist (and we cannot, of course, prove that they do not), they can only be those whose lawyers not only anticipated *Bailey*, but also advised their clients not to plead guilty in the face of monolithic circuit precedent to the contrary, to demand a trial at which the jury would be instructed to convict them for conduct they could not well deny, to object to that instruction, and then to attempt to make new law on appeal. Diligence is a virtue. But it hardly makes sense to celebrate futile litigation by creating incentives to turn routine criminal cases into vehicles for law reform.

A. The Waiver Fallacy

This is not a *waiver* case. No one proposes that Mr. Bousley was informed and understood that he could be convicted and sentenced under §924(c) only if he actively employed a firearm. No one proposes that he nonetheless deliberately withheld an objection to suffering conviction on the basis of the behavior reflected in the record. If Mr. Bousley's claim is not cognizable in a §2255 proceeding, it cannot be because he made an intelligent choice to forego an objection he knew or should have known was open to him, but rather because the government's interest in preserving his conviction and sentence is so powerful that Mr. Bousley must *forfeit* a claim he most certainly did not *waive*.

Yet the government has no legitimate interest in the incarceration of a citizen who did not engage in the behavior that Congress has condemned and, in this instance, no legitimate administrative interest in minimizing collateral litigation into the factual circumstances of individual cases. Mr. Bousley's *legal* innocence claim rests entirely upon the *extant record*. No fact-finding outside that record is needed to sustain it.

B. The Effect Of A Guilty Plea

Mr. Bousley's plea of guilty no more constituted a waiver of the claim Mr. Bousley seeks to vindicate in this §2255 action than did his failure to object to the trial court's construction of §924(c). *Tollett v. Henderson*, 411 U.S. 258, 266 (1973)(disclaiming the notion that a defendant who pleads guilty waives rights apart from the procedural rights associated with a trial); *accord Menna v. New York*, 423 U.S. 61, 62 n.2 (1975)(explaining that "waiver [is] not the basic ingredient of this line of cases").

Mr. Bousley's plea was plainly involuntary and unintelligent inasmuch as he was misled regarding *the* crucial element of the §924(c) "using" offense. *Henderson v. Morgan*, 426 U.S. 637, 644-45 (1976). *See McCarthy v. United States*, 394 U.S. 459, 466 (1969)(explaining that a plea "cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts").[24]

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[24] Not every guilty plea entered in a mistaken estimate of background law is, for that reason, invalid. This Court held in *Brady v. United States*, 397 U.S. 742 (1970), that a plea was not open to collateral attack simply because the defendant erroneously believed that, if he went to trial, the jury would be empowered to recommend a death sentence. In that case, however, the defendant had been fully and accurately informed of the elements of the charge against him, and it was on that premise

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In both *Menna v. New York*, 423 U.S. 61, and *Blackledge v. Perry*, 417 U.S. 21 (1974), this Court held that defendants who plead guilty do not forego the right to attack their pleas on grounds that go to the government's ability to bring them into court to answer a criminal indictment in the first instance. That principle is plainly applicable here. Mr. Bousley contends that the behavior described in the record clearly does not support his prosecution for "using" a firearm within the meaning of §924(c). Accordingly, his claim goes not to the procedural *manner* in which the government proceeded against him, but rather to the very authority of the government to proceed against him at all.

Ordinarily, a criminal defendant who pleads guilty admits not only the particular conduct reflected in the record, but also his guilt of the offense to which the plea is entered. *United States v. Broce*, 488 U.S. 563, 570 (1989). Yet that general understanding of a guilty plea's implications presup-

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[24] (...continued)
that the Court concluded that his miscalculation regarding the jury's power to impose a death penalty on conviction did not "impugn the truth or reliability of his plea." *Id.* at 757. Thus, the defendant in *Brady* voluntarily admitted that he had engaged in the conduct that the statute in that case condemned as criminal based on an accurate understanding of what that conduct was. *See United States v. Brown*, 117 F.3d at 478. In this case, by contrast, Mr. Bousley was not informed that he could be convicted of "using" a firearm only if he actively employed a gun and thus did not, and could not, voluntarily admit his guilt. He made no faulty risk assessment, but pled guilty rather than force a trial that could lead to only one result. Other lower courts have found *Brady* plainly distinguishable and thus have rejected any suggestion that a plea of guilty forecloses a federal prisoner's *Bailey* claim. *E.g., Lee v. United States*, 113 F.3d 73, 75 (7th Cir. 1997)(explaining that a defendant who pleads guilty waives a future challenge to the existence of facts but not the right to contest whether those facts make out a crime); *United States v. Thompson*, 122 F.3d at 307 (holding that a plea of guilty to "using" was open to attack in a §2255 action where, in light of *Bailey*, there was no sufficient factual basis to sustain the conviction).

poses that the defendant is informed of the elements of the offense, so that he is in a position to know that his conduct meets the statute's requirements. It is because a plea ordinarily admits guilt that it is so essential that the defendant be properly informed. Otherwise, the admission of guilt has no basis and thus can offer no support for the conviction and sentence that rest upon it. *Id.* at 570. For that reason, Rule 11(c)(1) of the Federal Rules of Criminal Procedure directs a district court to "address the defendant personally" in open court and to "inform" the defendant of "the nature of the charge to which the plea is offered." *Broce*, 488 U.S. at 570.

This Court has recognized that collateral challenges to pleas of guilty are problematic when they require the reviewing court to investigate matters outside the record. *Id.* at 575. In this instance, however, Mr. Bousley's claim rests entirely on the *extant record* made at his plea colloquy. None of the practical difficulties the Court has noted in other cases obtains, and the government has no serious argument that an adjudication of Mr. Bousley's claim would demand significant litigation effort. It would not. By the government's own admission, the record discloses that Mr. Bousley had "'such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt.'" Brief for the United States, at 9, quoting *Tollett v. Henderson*, 411 U.S. at 644.

The basic principle is clear. The government can explain to a defendant that the behavior in which he engaged will result in a conviction if he goes to trial, and can reap the benefits of the defendant's willingness to accept the inevitable and spare everyone concerned the time and trouble a trial would entail. But the government cannot misinform a defendant that he can be convicted and sentenced on the basis of behavior that the relevant criminal statute does not cover, obtain a guilty plea on that basis, and *still* insist that

the plea justifies the defendant's imprisonment for a crime he did not commit.[25]

C. Conventional Default Doctrine

The circuit court below also treated this case as one in which Mr. Bousley had committed procedural default at the trial stage and must now demonstrate the "cause" and "prejudice" conventionally required to make a claim cognizable in a §2255 action despite default. *See United States v. Frady*, 456 U.S. 152 (1982). It is not at all clear that default doctrine governing cases that went to trial is apposite in this guilty plea case. But, to the extent the doctrine has any bearing here, it leads ineluctably to the same result: Mr. Bousley's claim is not foreclosed.

By all accounts, *Bailey's* interpretation of §924(c) was not reasonably available to Mr. Bousley. He thus had "cause" for failing to advance, at that time, the claim he presses now via §2255. No circuit court in the country had construed §924(c) in the way this Court ultimately did.[26] Faced with this unanimous precedent, Mr. Bousley lacked the tools with which to forge his current claim and thus had "cause" for failing to do so. *Reed v. Ross*, 468 U.S. 1 (1984); *cf. Engle v. Isaac*, 456 U.S. 107 (1982)(concluding that a prisoner had the necessary tools and *for that reason* had not shown "cause").[27]

Equally, Mr. Bousley has demonstrated "prejudice." After all, his understandable inability to anticipate *Bailey's* authoritative construction of §924(c) prevented him from avoiding conviction and sentencing on a record that did not reflect the necessary active employment of a firearm. *United States v. Frady*, 456 U.S. at 174 (explaining that "prejudice" is established if it appears that the error that went uncorrected raises a "substantial likelihood" that the result would otherwise have been different); *Reed v. Ross*, 468 U.S. at 12. (accepting that a petitioner had demonstrated "prejudice" because he "might not have been convicted" if he had been able to anticipate a later change in the law).

Moreover, this is quintessentially "an extraordinary case" in which a mistake "probably resulted in the conviction" of an innocent person. *Murray v. Carrier*, 477 U.S. 478, 496 (1986). Accordingly, Mr. Bousley would be entitled to advance his *Bailey* claim even if he had no sufficient "cause" for failing to present it previously. The circuit court

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[25] The existence of a plea agreement hardly forecloses an attack on a conviction and sentence that has no basis in the criminal statute under which a defendant was charged. This Court has approved plea negotiation as a means of implementing the policies that Congress has prescribed in federal criminal statutes. The Court has *never* suggested that plea negotiation can simply *substitute* for the enforcement of those statutes. When federal prosecutors and defense counsel engage in plea bargaining, they do so against the background of the federal criminal statutes implicated in a case. This is why Rule 11(f) of the Federal Rules of Criminal Procedure provides that a district court should not enter a judgment on the basis of a guilty plea "without making such inquiry as shall satisfy it that there is a factual basis for the plea." That requirement ensures that federal criminal judgments are anchored in the actual behavior for which Congress has authorized a criminal sanction. In this case, of course, the prosecutors who pressed a §924(c) "using" charge against Mr. Bousley relied in good faith on the understanding of that statute embraced by every circuit court in the country. Nevertheless, the law that Congress made has not been vindicated, but frustrated, and a man who did not engage in the conduct that Congress has actually denounced is in prison.

[26] *See* note 2 *supra*.

[27] The circuit court below offered no explanation for its failure to find "cause" in light of *Engle* and *Reed*. Instead, the court simply relied on the prior decision in *United States v. McKinney*, 79 F.3d 105 (8th Cir. 1996), *vacated*, __ U.S. __, 117 S.Ct. 1816 (1997), where another panel had summarily disposed of a similar question (equally without citation of authority), with one judge dissenting.

below did not consider this further "probable innocence" feature of conventional default doctrine. On that ground alone, the government has suggested that the lower court's decision should be reversed.[28]

The same result would follow if this case were governed by the amendments to §2255 included in the Anti-Terrorism and Effective Death Penalty Act of 1996.[29] Those amendments make no change in this Court's doctrine (reflected in *Frady*, *Engle*, *Reed*, and *Murray*) governing initial §2255 actions in which the government contends that claims are foreclosed because of previous default at the trial level.[30]

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[28] Brief for the United States, at 7.

[29] Pub. L. No. 154-132, 110 Stat. 1214. The amendments to §2255 in the new Act are inapplicable to this case, because Mr. Bousley filed his motion prior to the effective date of the AEDPA, April 24, 1996. *Lindh v. Murphy*, __ U.S. __, 117 S.Ct. 2059 (1997).

[30] The new Act does address analogous cases in which state prisoners are said to have committed default with respect to fact-finding in state court and in which either state or federal prisoners are said to have omitted claims from previous §2254 or §2255 actions. In those instances, the Act explicitly excuses a prisoner's failure to present a claim earlier if the claim rests on a "new rule" that is retroactively applicable to cases on collateral review. *E.g.*, 28 U.S.C. §2254(e)(2)(A)(i)(default with respect to state court fact-finding); 28 U.S.C. §2244(b)(2)(A)(default with respect to a prior §2254 action); 28 U.S.C. §2255 (default with respect to a prior §2255 action). Thus, the new Act plainly recognizes that prisoners cannot anticipate novel propositions of law, that no forfeiture sanction can create a sensible incentive to do so, and that the system works best if prisoners are permitted to advance "new rule" claims later. Indeed, under these provisions in the new Act, the only question to be answered is whether a new rule is retroactively applicable. If so, a prisoner advancing a claim that depends on that new rule can proceed without meeting any further standard meant to discourage default (*i.e.*, without showing "cause," "prejudice," or "probable innocence").

CONCLUSION

For the reasons stated above, the judgment below should be reversed.

Respectfully submitted,

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CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

KENNETH E. BOUSLEY,
Petitioner,

v.

JOSEPH M. BROOKS,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND FAMILIES AGAINST MANDATORY MINIMUMS FOUNDATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Does this Court's decision in *Bailey v. United States*, apply retroactively, so that a defendant who pled guilty to a charge of using a firearm in violation of 18 U.S.C. § 924(c) is entitled to collateral relief upon proof that he was not told that the facts of his case do not amount to "use" under § 924(c)?

2. Does a guilty plea waive the defendant's right to attack his conviction, where a subsequent change in the law makes the facts upon which the plea was based non-criminal?

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INTERESTS OF AMICI CURIAE[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nationwide, non-profit voluntary association of criminal defense lawyers founded in 1958 with a membership of more than 9,000 attorneys. NACDL is affiliated with 68 state and local criminal defense organizations with which it works cooperatively on issues related to criminal law and procedure, and thus, it speaks for more than 28,000 criminal defense lawyers nationwide. Among NACDL's objectives is to ensure the proper administration of criminal justice and to promote fair and consistent application of sentencing laws.

Families Against Mandatory Minimums Foundation ("FAMM") is a nonprofit, nonpartisan, educational association that conducts research and engages in advocacy regarding mandatory minimum sentencing laws. FAMM argues that such laws, of which 18 U.S.C. § 924(c) is a prominent example, are expensive and inefficient, perpetuate unwarranted and unjust sentencing disparities, and transfer the sentencing function from the judiciary to the prosecution. Founded in 1991, FAMM has 33,103 members nationwide with 36 chapters in 26 states and the District of Columbia. FAMM does not contend that crime should go unpunished, but that the punishment should fit the crime.

SUMMARY OF ARGUMENT

This case presents a question of exceptional importance to the administration of criminal justice—whether a federal prisoner must continue to serve a five-year mandatory prison term for conduct that subsequent legal developments establish

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[1] In accordance with Supreme Court Rule 37.6, amici curiae represent that no party other than counsel for amici authored this brief in whole or in part, and no person or entity, other than amici, has made a monetary contribution to the preparation or submission of this brief. The petitioner and respondent have consented to the filing of this brief, and amici have filed the letters of consent with the Clerk of the Court, pursuant to Supreme Court Rule 37.3.

does not violate the statute under which he was convicted. Fundamental principles of justice and established precedent addressing the availability of collateral relief confirm that the prisoner's continued incarceration in such circumstances is insupportable.

At the time he pleaded guilty to the charge of "use" of a firearm during and in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c), petitioner Kenneth Bousley, his counsel, the government, and the district court labored under the misimpression that the possession, storage, and availability of firearms in his bedroom near illicit drugs was sufficient to constitute "use" under the statute. In *Bailey v. United States*, 516 U.S. 137, 116 S. Ct. 501, 506 (1995), this Court unanimously rejected that broad reading of the statute and held instead that the government must prove "active employment" of the firearm. In so ruling, the Court broke sharply with uniform case law in the courts of appeals. The existing record establishes on its face that there was no evidence of active employment of a gun in this case and that Bousley is innocent of the § 924(c) offense. Because his conviction and sentence were "imposed in violation of the Constitution or laws of the United States," 28 U.S.C. § 2255, collateral relief is both available and appropriate.

As this Court declared in *Davis v. United States*, 417 U.S. 333, 346 (1974), an intervening interpretation of substantive law that establishes that a federal prisoner's "conviction and punishment are for an act that the law does not make criminal," is retroactively available to the prisoner on collateral review, because such a circumstance "inherently results in a complete miscarriage of justice." The retroactivity doctrine announced by *Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion), does nothing to alter the result or analysis dictated by *Davis*.

The court of appeals erred in holding that Bousley's § 2255 motion was procedurally barred because of his failure to attack the validity of his § 924(c) conviction and sentence on

direct appeal. As a preliminary matter, procedural default analysis is inapposite. In contrast to other cases in which this Court has held that a prisoner had defaulted his claim, Bousley violated no specific procedural rule in failing to challenge his § 924(c) conviction on appeal. Bousley had no full and fair opportunity to challenge his § 924(c) conviction on direct appeal, as the *Bailey* decision was handed down more than five years after he pleaded guilty. A long and settled line of Eighth Circuit precedent precluded him from advancing on direct appeal the construction of § 924(c) that ultimately prevailed in *Bailey*. To require that to avoid a procedural bar, a prisoner must raise on direct appeal arguments explicitly rejected by controlling precedent would encourage frivolous appeals containing laundry lists of futile claims.

Even if his *Bailey* claim were subject to procedural default, Bousley has shown both cause and prejudice and, in the alternative, a miscarriage of justice justifying collateral review on the merits of his *Bailey* claim. Under *Reed v. Ross*, 468 U.S. 1 (1984), a petitioner establishes "cause" for a procedural default where, as here, a claim "is so novel that its legal basis is not reasonably available to counsel." *Id.* at 16. Moreover, as the government concedes, the Eighth Circuit erred in failing to consider whether Bousley was entitled to collateral review because "he falls within the 'narrow class of cases . . . implicating a fundamental miscarriage of justice.'" *Schlup v. Delo*, 513 U.S. 298, 315 (1995) (citation omitted). Bousley's is an "extraordinary case," *id.* at 321, because the error "has probably resulted in the conviction of one who is actually innocent." *Id.* at 327 (quoting *Murray v. Carrier*, 477 U.S. 478, 496 (1986)).

Finally, the fact that Bousley pleaded guilty to "use" of a firearm under § 924(c) is no basis for denying him relief. Contrary to the view of the court of appeals, by pleading guilty the petitioner did not "waive" his right to challenge his conviction on collateral review. When, on the basis of an existing record, a prisoner asserts his right "not to be haled into

court at all" upon the charge to which he pleaded guilty, even a valid guilty plea will not stand in the way of his obtaining collateral relief. *United States v. Broce,* 488 U.S. 563, 575 (1989). In any event, Bousley's guilty plea was not valid. Because he mistakenly believed that he could be convicted of "use" of a firearm under § 924(c) even though he had not actively employed a firearm, his guilty plea was not knowing and voluntary and cannot withstand a collateral attack.

For this Court to deny prisoners on collateral review the right to avail themselves of *Bailey* because of the happenstance that their convictions had become final before *Bailey* was decided—at a time when settled circuit precedent prevented them from urging on direct appeal the construction of § 924(c) ultimately adopted by this Court—would be both unduly formalistic and manifestly unjust.

ARGUMENT

I. PURSUANT TO 28 U.S.C. § 2255, PETITIONER IS ENTITLED TO VACATUR OF HIS CONVICTION AND SENTENCE IMPOSED UNDER 18 U.S.C. § 924(C), AS THEY WERE BASED ON CONDUCT THAT IS NOT A CRIME.

Petitioner Kenneth Bousley stands convicted and is now serving a mandatory five-year sentence for an act that is not, according to this Court, a crime. Charged with "use" of a firearm during and in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c), Superseding Indictment, Count II, Bousley pleaded guilty to that count on the basis of his mere "ownership and possession" of firearms stored in his bedroom near the methamphetamine that he was charged with possessing with the intent to distribute. Plea Agreement, at 2; Transcript of Change of Plea Hearing, dated June 15, 1990, at 13 (petitioner's statement that he understood he was charged with "possession of a firearm"), 15. Five years later, in *Bailey v. United States,* 516 U.S. 137, 116 S. Ct. 501 (1995), this Court unanimously held that such conduct does not violate § 924(c).

There is no dispute that under *Bailey,* the mere possession, proximity to illicit drugs, or ready accessibility of a firearm to a person who commits a drug offense, is insufficient to constitute "use" within the meaning of § 924(c). *Bailey,* 116 S. Ct. at 506. To obtain a valid conviction for "use" under § 924(c), this Court held, the government must prove active employment of the firearm. *Id.* In so ruling, this Court broke sharply from existing case law, effectively overruling every court of appeals' precedent construing that aspect of the statute.

Section 2255 of Title 28 affords a collateral remedy for a federal prisoner asserting the right to be released upon the ground that his sentence "was imposed in violation of the Constitution or laws of the United States." Bousley rightfully maintains that his conviction and sentence for "use" of a firearm under § 924(c) were imposed in violation of the "laws of the United States" because, under *Bailey,* "use" under the statute requires more than mere ownership and possession, but also active employment of a firearm—conduct which the record reflects is entirely absent in this case.

A. Under *Davis v. United States,* Intervening Interpretations of Substantive Federal Law Apply Retroactively on Collateral Review.

1. In *Davis v. United States,* 417 U.S. 333, 346-47 (1974), this Court held that when, as here, a subsequent interpretation of substantive law reveals that a federal prisoner's conviction and punishment are for conduct that is not criminal, such a circumstance constitutes a "fundamental defect" that inherently results in a "complete miscarriage of justice" and justifies the grant of collateral relief. By ruling in favor of a prisoner whose conviction had become final, this Court necessarily also held that such an intervening change in federal law applied retroactively on collateral review.

The facts of *Davis* are analogous to those presented here. A selective service board had ordered Davis to report for

a physical examination. When he failed to appear, the board declared him a delinquent and subsequently accelerated his induction into the Armed Forces. Davis again failed to report, and as a result, was prosecuted and convicted for failure to comply with the Selective Service Act. *Id.* at 335-36. While Davis's direct appeal was pending, this Court decided *Gutknecht v. United States*, 396 U.S. 295 (1970), which held that the Selective Service regulations that accelerated the induction of delinquent registrants were punitive in nature and without legislative authorization. *Davis*, 417 U.S. at 337-38.

After *Gutknecht*, the Ninth Circuit remanded Davis's case to the district court for reconsideration, but the lower courts held that *Gutknecht* did not affect his conviction because Davis's induction had not in fact been accelerated because of his delinquency status. *Id.* at 338-39. While Davis's subsequent petition for certiorari was pending in this Court, the Ninth Circuit ruled in *United States v. Fox*, 454 F.2d 593 (9th Cir. 1971), that in light of *Gutknecht*, a registrant in the same position as Davis had been subject to the forbidden accelerated induction as a matter of law. This Court denied Davis's petition for certiorari. *Davis*, 417 U.S. at 340.

Thereafter, Davis filed a § 2255 motion in which he contended that the *Fox* decision changed the law of the Ninth Circuit after the affirmance of his conviction. This Court granted review after the court of appeals held that the decision on Davis's direct appeal constituted "the law of the case" and that Davis was therefore not entitled to avail himself of the change in law on collateral review. *Id.* at 341-42.

The *Davis* Court rejected the Ninth Circuit's reliance on the "law of the case," emphasizing that even when a legal issue raised in a § 2255 motion has been determined against the petitioner on a prior application or on direct appeal, the petitioner may nonetheless be entitled to relief "upon showing an intervening change in the law." *Id.* at 342 (quoting *Sanders v. United States*, 373 U.S. 1, 17 (1963)). Instead of relying on the finality of the conviction as reason to deny retroactive

application of an intervening interpretation of substantive law, the Court held that the "miscarriage of justice" standard enunciated in *Hill v. United States* governed the determination whether a prisoner would be entitled to invoke a change in law after his conviction had become final. Accordingly, the availability of relief turned on "whether the claimed error of law was 'a fundamental defect which inherently results in a complete miscarriage of justice,' and whether '[i]t . . . present[s] exceptional circumstances where the need for the remedy afforded by the writ of *habeas corpus* is apparent.'" *Davis*, 417 U.S. at 346 (quoting *Hill*, 368 U.S. 424, 428 (1962)).

The Court did not address whether *Fox* in fact established that Davis's induction order was invalid, but held that if it did, then Davis's "conviction and punishment are for an act that the law does not make criminal." In the Court's view, "[t]here can be no room for doubt that such a circumstance 'inherently results in a complete miscarriage of justice' and 'present[s] exceptional circumstances' that justify collateral relief under § 2255." *Id.* at 346-47; *accord id.* at 347 (Powell, J., concurring in part and dissenting in part) (endorsing majority's holding that review under § 2255 was available to Davis "due to the intervening change in the law"). In so ruling, the Court necessarily resolved both the cognizability of Davis' claim in a § 2255 motion *and* the retroactivity of new interpretations of substantive criminal law that are sufficiently fundamental to the determination of guilt.

2. *Davis* remains good law and is directly controlling in this case. This Court held in *Bailey*, which was decided more than five years after Bousley pleaded guilty, that the mere possession, proximity to illicit drugs, and availability of a firearm were insufficient to support a conviction for "use" within the meaning of § 924(c). As a result, Bousley is now serving a prison term for a crime of which he is innocent. As in *Davis*, there is no "room for doubt" that Bousley's continued incarceration "inherently results in a complete miscarriage of

justice," a predicament that presents exceptional circumstances meriting collateral relief under § 2255.

With remarkable unanimity the courts of appeals have granted § 2255 relief after this Court (and in some instances, the courts of appeals) narrowed the reach of federal criminal statutes under which petitioners had been convicted when it was clear that the conduct underlying a conviction did not, in fact, violate the statute in question.[2] Consistent with that long-standing approach, the courts of appeals uniformly have accepted that a federal prisoner whose § 924(c) conviction became final before *Bailey* was decided asserts a cognizable claim for collateral relief if his conviction for "use" of a firearm was based on conduct that did not constitute a crime under

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[2] For cases granting petitioners the benefit on collateral review of *Ratzlaf v. United States*, 510 U.S. 135 (1994) (holding that knowledge of illegality is an essential element of the crime of currency structuring), see, *e.g.*, *United States v. Brown*, 117 F.3d 471 (11th Cir. 1997); *Peck v. United States*, 73 F.3d 1220 (2d Cir. 1995), *vacated on other grounds*, 106 F.3d 450 (2d Cir. 1997); *United States v. Dashney*, 52 F.3d 298 (10th Cir. 1995).

For decisions applying *McNally v. United States*, 483 U.S. 350 (1987) (holding that the federal mail-fraud statute protects property rights, not the intangible right of the citizenry to good government), see, *e.g.*, *Borre v. United States*, 940 F.2d 215 (7th Cir. 1991); *Callanan v. United States*, 881 F.2d 229 (6th Cir. 1989), *cert. denied*, 494 U.S. 1083 (1990); *United States v. Mitchell*, 867 F.2d 1232 (9th Cir. 1989) (per curiam); *Dalton v. United States*, 862 F.2d 1307 (8th Cir. 1988); *United States v. Mandel*, 862 F.2d 1067 (4th Cir. 1988), *cert. denied*, 491 U.S. 906 (1989); *United States v. Shelton*, 848 F.2d 1485 (10th Cir. 1988) (en banc); *Ingber v. Enzor*, 841 F.2d 450 (2d Cir. 1988).

For cases applying *United States v. Maze*, 414 U.S. 395 (1974) (holding that the mail-fraud statute did not reach mailings subsequent to the use of stolen or counterfeit credit cards), see, *e.g.*, *Strauss v. United States*, 516 F.2d 980 (7th Cir. 1975); *United States v. Travers*, 514 F.2d 1171 (2d Cir. 1974), and for those applying other intervening decisions narrowing the substantive reach of federal criminal statutes, see, *e.g.*, *Ianniello v. United States*, 10 F.3d 59 (2d Cir. 1993); *United States v. Sood*, 969 F.2d 774 (9th Cir. 1992); *United States v. McClelland*, 941 F.2d 999 (9th Cir. 1991).

Bailey.[3]

This is not to say that a federal prisoner automatically qualifies for collateral relief simply because his conviction or sentence was not imposed in strict compliance with a federal statute. The *Hill* fundamental defect/miscarriage of justice standard serves as both a critical bulwark against unjust convictions and as a substantial hedge against the risk that final convictions will be upset after minor judicial tinkering with federal law. Hence, many lapses in compliance with federal statutes and rules will not rise to the level of a miscarriage of justice.[4] Even substantive changes of law that have arisen since a prisoner's conviction has become final may be of insufficient significance to warrant relief from a final conviction. Wherever that line is drawn, however, Bousley's *Bailey* claim merits relief.

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[3] *See, e.g.*, *Triestman v. United States*, 124 F.3d 361, 1997 U.S. App. LEXIS 22752 (2d Cir. 1997); *In re Hanserd*, 123 F.3d 922 (6th Cir. 1997); *Lee v. United States*, 113 F.3d 73 (7th Cir. 1997); *United States v. McPhail*, 112 F.3d 197 (5th Cir. 1997); *United States v. Barnhardt*, 93 F.3d 706 (10th Cir. 1996). *But see* Pet. App. 4 n.3 (rejecting Bousley's contention that *Davis* mandates success on his *Bailey* claim because Bousley, unlike Davis, had pleaded guilty and had not challenged his conviction on direct appeal).

[4] *See, e.g.*, *Reed v. Farley*, 512 U.S. 339, 341, 352-55 (1994) (state court's failure to observe 120-day rule of the Interstate Agreement on Detainers not a violation of federal law cognizable under § 2254 where the defendant did not object to the trial date when set and suffered no prejudice); *United States v. Timmreck*, 441 U.S. 780, 784-85 (1979) (§ 2255 relief unavailable to remedy a technical violation of Federal Rule of Criminal Procedure 11, at least where no "other aggravating circumstances" are present); *Hill v. United States*, 368 U.S. 424, 426, 429 (1962) (§ 2255 relief unavailable to redress a formal violation of Federal Rule of Criminal Procedure 32, at least when no "other aggravating circumstances" are present), *cf. United States v. Tucker*, 404 U.S. 443, 447 (1972) (ordering resentencing under § 2255 to permit trial judge to consider effect of the invalidity of petitioner's prior felony convictions, because "we deal here, not with a sentence imposed in the informed discretion of a trial judge, but with a sentence founded at least in part upon misinformation of constitutional magnitude").

This Court's decision in *United States v. Addonizio*, 442 U.S. 178 (1979), provides helpful guidance regarding when a subsequent change in federal law will be deemed sufficiently fundamental to justify collateral relief. In that case, three prisoners alleged that a change in the policies of the United States Parole Commission prolonged their imprisonment beyond the period intended by the sentencing judge. In each case, the judge imposed a sentence based in part on an understanding—subsequently rendered incorrect—that the prisoner would be released as soon as he became eligible for parole. *Id.* at 180-81.

In holding that the change in parole policy was not sufficiently fundamental to merit collateral relief under § 2255, the Court reasoned that there was "no claim of a constitutional violation; the sentence imposed was within the statutory limits; and the proceeding was not infected with any error of fact or law of the 'fundamental' character that renders the entire proceeding irregular and invalid." *Id.* at 186. Whereas the change in Parole Commission policies in *Addonizio* "did not affect the lawfulness of the judgment itself—then or now," *id.* at 187, in *Davis*, by contrast, the subsequent development at issue "was a change in the substantive law that established that the conduct for which petitioner had been convicted and sentenced was lawful. To have refused to vacate his sentence would surely have been a 'complete miscarriage of justice,' since the conviction and sentence were no longer lawful." *Addonizio*, 442 U.S. at 186-87.

The same can be said for the judgment in this case. Both "then and now," Bousley's § 924(c) conviction was unlawful because, as this Court held in *Bailey*, the conduct for which he had been convicted—the storage of a firearm near illicit drugs—did not violate § 924(c). Although this Court's decision in *Bailey* was not announced until after Bousley's conviction became final, that decision spoke authoritatively as to what "use" under § 924(c) *always* properly meant. *See Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-13 (1994).

Bousley is innocent of that offense now and was equally innocent of the offense when he was convicted. To avoid a fundamental error rendering his conviction and sentence "irregular and invalid," Bousley's conviction and sentence under § 924(c) must be vacated.

B. *Teague v. Lane* is Inapposite.

In *Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion), this Court limited the enforceability of "new constitutional rule[s] of criminal procedure" in federal habeas corpus actions brought by state prisoners. *Id.* at 299. The retroactivity of *Bailey* is not squarely at issue in this case,[5] but if it were, the Court should find that *Bailey* applies retrospectively. *Teague* is inapposite for several reasons.

First, this Court developed the *Teague* doctrine in the context of state prisoners seeking federal habeas corpus relief pursuant to § 2254. The federalism and comity concerns that animate the *Teague* doctrine, *see id.* at 310, have little force in the context of a *federal* prisoner seeking relief from a *federal* court because of an intervening interpretation of *federal* law.

Second, even assuming *arguendo* that the *Teague* doctrine applies generally to federal prisoners seeking relief pursuant to § 2255, it does not limit the availability on collateral review of intervening substantive interpretations of federal criminal statutes. *Teague* and its forerunners restricted the retroactive enforceability only of "new constitutional rules of criminal *procedure*," *Id.* at 310 (emphasis added), not new "rules," or interpretations, delineating the *substance* of criminal federal statutes. *See Robinson v. Neil*, 409 U.S. 505, 508-09

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[5] *See* Pet. App. 4 n.2 (holding that the "retroactive effect of *Bailey* is a distinct issue" from whether a defendant has waived the right to collateral review by failing to preserve an issue on appeal); Brief for the United States on Petition for a Writ of Certiorari, at 11 n.6 (observing that the decision below did not address the "retroactivity" of *Bailey* and that there is no conflict among the circuits on that issue). *But see* Brief for the Petitioner on Petition for a Writ of Certiorari, at i (Questions Presented).

(1973) (distinguishing between substantive and procedural decisions because "[g]uarantees that do not relate to these procedural rules [procedural rights and methods of conducting trials] cannot, for retroactivity purposes, be lumped conveniently together in terms of analysis"); *Mackey v. United States*, 401 U.S. 667, 692-93 (1971) (Harlan, J.) (distinguishing between "procedural" and "substantive" rules for purposes of retroactivity analysis).

The rationale for the distinction is straightforward: with the exception of "watershed rules of criminal procedure," such as the right to counsel, which "significantly improve the pre-existing fact-finding procedures," *Teague*, 489 U.S. at 312, procedural rules governing "the use of evidence or . . . a particular mode of trial," *Robinson*, 409 U.S. at 508, affect only indirectly the integrity of the fact-finding process, the fundamental fairness of the trial, and the reliability of any ensuing conviction. New judicial constructions of the substance of federal criminal statutes, however, are of a different order of importance. A clear understanding of the conduct prohibited by a penal statute is essential to fair and effective law enforcement. Rulings such as *Bailey* that narrow the compass of federal statutes serve as a critical curb against a dragnet—such as was created in the overzealous prosecution of § 924(c) offenses—that ensnares the innocent alongside the guilty. In contrast to convictions obtained before a new rule of criminal procedure has been announced, convictions predicated on a misunderstanding of the scope of a federal criminal statute are not only unreliable—they are untenable.

Finally, even if the *Teague* doctrine applied, *Bailey* nonetheless would apply to federal prisoners seeking relief from their sentences in § 2255 motions. Under the first *Teague* exception, a new rule must be applied retroactively "if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'" *Teague*, 489 U.S. at 307 (quoting *Mackey*, 401 U.S. at 692 (Harlan, J.)); *see also Penry v. Lynaugh*, 492 U.S. 302, 331

(1989).[6]

The relevant precedent in deciding whether to afford retroactive application to federal prisoners seeking the benefit of a new interpretation of substantive criminal law under § 2255 is not *Teague*, but *Davis v. United States*, 417 U.S. 333, 344 (1974). If the intervening decision demonstrates that the prisoner's conviction and punishment are founded on a "fundamental defect" rising to the level of a "complete miscarriage of justice," the retroactivity inquiry is at an end, and the prisoner is entitled to avail himself of the new substantive decision. *Teague* did nothing to undermine the continued vitality of this Court's decision in *Davis*. For that reason, the courts of appeals have adopted the distinction between new substantive and procedural decisions, unanimously agreeing that the *Bailey* decision applies retroactively to § 2255 motions.[7]

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[6] In explaining the first exception in *Mackey*, Justice Harlan stated that "[t]here is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose," *Mackey*, 401 U.S. at 693. "In general, the first exception may be interpreted as distinguishing new rules of substantive criminal law, which always apply retroactively, from new rules of criminal procedure, which generally do not apply retroactively in cases that were final as of the time the new rule was announced." 2 JAMES S. LIEBMAN & RANDY HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 25.7, at 794 (2d ed. 1994); *cf. Gilmore v. Taylor*, 508 U.S. 333, 345 (1993) (new rule did not satisfy the first exception because it did not "decriminalize" any class of conduct).

[7] *See, e.g., Triestman v. United States*, 124 F.3d 361, 1997 U.S. App. LEXIS 22752, at *20 n.7 (2d Cir. 1997); *United States v. Barnhardt*, 93 F.3d 706, 709 (10th Cir. 1996); *Stanback v. United States*, 113 F.3d 651, 654 n.2 (7th Cir. 1997); *United States v. McPhail*, 112 F.3d 197, 199 (5th Cir. 1997); *see also United States v. Cota-Loaiza*, 936 F. Supp. 751, 753-54 (D. Colo. 1996) (collecting cases). *But see Price v. United States*, 959 F. Supp. 310, 315 (E.D. Va. 1997).

II. PETITIONER'S *BAILEY* CLAIM IS NOT PROCEDURALLY BARRED, BUT IF IT WERE, HE COULD DEMONSTRATE "CAUSE" AND "PREJUDICE" AND/OR A "MISCARRIAGE OF JUSTICE" EXCUSING ANY DEFAULT.

The court of appeals erred in holding that petitioner Kenneth Bousley's § 2255 motion was procedurally barred because of his failure to attack the validity of his § 924(c) conviction and sentence on direct appeal. *See* Pet. App. 3.[8]

A. Procedural Default Analysis is Inapplicable.

As a preliminary matter, procedural default analysis does not apply when a defendant asserts a claim for the first time in a § 2255 motion, unless a specific applicable procedural rule required the defendant to raise that claim at an earlier point in time. There was no such procedural rule requiring Bousley to challenge on appeal his conviction for "use" of a firearm under § 924(c), years before he had any legal basis for making that challenge. Indeed, such a procedural requirement would be misplaced when, as here, the basis urged for vacating a conviction and sentence was specifically *precluded* by controlling, crystallized case law at the time the conviction became final. Under such circumstances, in which a prisoner never had a full and fair opportunity to litigate his claim prior to filing his § 2255 motion, the claim is not procedurally barred.

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[8] The court of appeals relied in part on a faulty premise—its decision in *United States v. McKinney*, 79 F.3d 105, 109 (8th Cir. 1996) (holding on direct appeal that the defendant had waived his right to invoke *Bailey* because he did not preserve the issue at trial), *vacated*, 117 S. Ct. 1816 (1997), which it cited for the proposition that "*Bailey* does not resurrect a challenge to a section 924(c) conviction that has been procedurally defaulted." Pet. App. 3 & n.2. This Court vacated that decision and remanded for reconsideration in light of *Johnson v. United States*, 117 S. Ct. 1544 (1997), and on remand, the Eighth Circuit reversed McKinney's § 924(c) conviction. 120 F.3d 132 (8th Cir. 1997).

1. In contrast to other situations in which this Court has held that a prisoner had defaulted his claim, Bousley violated no specific procedural rule in failing to challenge his § 924(c) conviction on direct appeal under the peculiar circumstances presented here. As this Court explained in *Coleman v. Thompson*, 501 U.S. 722, 729-31 (1991), the procedural default doctrine is merely a means of respecting "adequate and independent state grounds"—such as the failure to observe a contemporaneous-objection rule—for a state court's refusal to grant a defendant relief from a conviction. *See, e.g., Wainwright v. Sykes*, 433 U.S. 72 (1977). While in certain circumstances this Court has imposed the "cause and prejudice" standard on federal prisoners as well, *see United States v. Frady*, 456 U.S. 152 (1982); *Davis v. United States*, 411 U.S. 233 (1973), the logic and holdings of these precedents do not apply to a federal prisoner in Bousley's position. As *Frady* and *Davis* make clear, the "cause and prejudice" standard applies only to cases in which the petitioner has defaulted a claim by failing to adhere to a particular procedural rule in place at the time of his conviction.[9]

In *Frady*, for example, the petitioner alleged that the trial court had erroneously instructed the jury. He raised the claim for the first time in his § 2255 motion. Because Frady had failed to comply with Rule 30 of the Federal Rules of Criminal Procedure, which required a party to raise any objections to jury instructions "before the jury retires to consider its verdict," this Court held that he had procedurally defaulted his claim. *See Frady*, 456 U.S. at 162-64. Similarly,

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[9] *See English v. United States*, 42 F.3d 473, 474, 489-479 (9th Cir. 1994) (holding that federal prisoners had not defaulted their claims based on *Gomez v. United States*, 490 U.S. 858 (1989), by raising them for the first time in § 2255 motions, because "there was no rule requiring the petitioners to raise their *Gomez* claim on direct appeal"); *United States v. Corsentino*, 685 F.2d 48, 50 (2d Cir. 1982) (finding no procedural default because "no rule of federal procedure obliges a defendant to make a contemporaneous objection when a prosecutor violates the terms of a plea agreement").

in *Davis*, the prisoner raised for the first time in his § 2255 motion a claim of unconstitutional discrimination in the composition of the grand jury that indicted him. Because Federal Rule of Criminal Procedure 12(b)(2) required that "objections based on defects in the institution of the prosecution or in the indictment" must be raised "by motion before trial" upon penalty of waiver, the Court held that Davis's claim was procedurally barred, absent a showing of cause and actual prejudice. *Davis*, 411 U.S. at 236-37.

By contrast, no procedural rule required Bousley to attack his conviction and sentence under § 924(c) on direct appeal years before *Bailey* was decided. Indeed, in light of the fact that Bousley pleaded guilty to the § 924(c) offense, Eighth Circuit precedent suggested the *opposite*: In the Eighth Circuit, claims challenging the voluntariness of a guilty plea, like claims of ineffective assistance of counsel, must first be presented to the district court and are not cognizable on direct appeal, because of the possibility that such claims will require the development of facts outside the record.[10] That Bousley's § 2255 motion attacked the knowing and voluntary nature of his guilty plea is all the more reason for this Court to decline to find that he violated an applicable procedural rule.

2. Nonetheless, it is conventional wisdom that "[s]o far as convictions obtained in the federal courts are concerned, the general rule is that the writ of *habeas corpus* will not be allowed to do service for an appeal." *Sunal v. Large*, 332 U.S. 174, 178 (1947); *see also Frady*, 456 U.S. at 165; *United States v. Addonizio*, 442 U.S. 178, 184 (1979); *Adams v. United States ex rel. McCann*, 317 U.S. 269, 274 (1942). These decisions, however, do not demand that Bousley

[10] *See, e.g., United States v. Young*, 927 F.2d 1060, 1061 (8th Cir.), *cert. denied*, 502 U.S. 943 (1991); *United States v. Murphy*, 899 F.2d 714, 716 (8th Cir. 1990); *United States v. Ulland*, 638 F.2d 1150, 1150 (8th Cir. 1981) (per curiam); *United States v. Mims*, 440 F.2d 643, 644 (8th Cir. 1971) (per curiam).

prognosticate subsequent changes in the law that constitute a sharp departure from precedent settled during the time for taking a direct appeal.

This Court acknowledged this distinction in *Sunal*. In denying a writ of habeas corpus to federal petitioners despite two intervening favorable Supreme Court decisions, *Estep v. United States* and *Smith v. United States*, 327 U.S. 114 (1946), which established that the trial courts had erred in denying the petitioners a particular defense, the *Sunal* Court held the claims barred because "[a]ppeals could have been taken in these cases, but they were not." *Sunal*, 332 U.S. at 177 (footnote omitted). The petitioners argued that since the state of the law made the appeals seem "futile," it would be unfair to deny the petitioners relief because of their failure to appeal. The Court rejected that argument, but only because the Court was not convinced that an appeal raising the arguments that ultimately prevailed in the subsequent Supreme Court decisions would, in fact, have been futile. At the time the defendants in *Sunal* were convicted, *Estep* and *Smith* were pending before the appellate courts; indeed, the same counsel represented the defendants in *Sunal* as in *Estep* and *Smith*. "The same road was open to Sunal and Kulick as the one Smith and Estep took." *Id.* at 181. The Court stressed: "The case, therefore, is *not one where the law was changed after the time for appeal had expired*." *Id.* (emphasis added). "It is rather a situation where at the time of the convictions the definitive ruling on the question of law had not crystallized." *Id.*; *cf. Sanders v. United States*, 373 U.S. 1, 17 (1963).

Bousley's plight at the time he was convicted and sentenced in 1990 was entirely different from that of the prisoners in *Sunal*. For him, controlling law had "crystallized," establishing beyond peradventure (erroneously, as it turns out) that possession of a firearm was sufficient to constitute "use" under § 924(c) where the firearm was "present" and "available"

to the defendant to protect his drug enterprise.[11] In fact, as the Solicitor General pointed out in the government's brief submitted in *Bailey*, "all" of the courts of appeals routinely affirmed convictions under § 924(c)(1) without proof of "actively using the firearm in any way." Brief for the United States, at 16 n.4, *Bailey v. United States*, 516 U.S. 137, 116 S. Ct. 501 (1995) (Nos. 94-7448 and 94-7492); *see also id.* at 32 & n.12. Thus, the *Sunal* bar on raising claims in a § 2255 motion that could have been raised on direct appeal, does not apply.[12]

3. To apply procedural default analysis to a petitioner in Bousley's predicament not only would be unfair to Bousley, who surely cannot be faulted for failing to predict that a solid wall of circuit authority would be overturned by this Court, but also unwise inasmuch as it would cause an unnecessary drain on judicial resources. As noted above, if in 1990, Bousley had challenged on appeal his conviction and sentence on the ground that there was no evidence of "active employment" of a firearm, his argument would have been

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[11] *See, e.g., United States v. Young-Bey*, 893 F.2d 178, 181 (8th Cir. 1990) (finding it sufficient that the firearms were "readily accessible" to protect and facilitate the drug enterprise); *United States v. La Guardia*, 774 F.2d 317, 321 (8th Cir. 1985) ("Section 924(c)(1) reaches the possession of a firearm which in any manner facilitates the execution of a felony"; "[t]he presence and availability in light of the evident need demonstrates the use of a firearm to commit the felony.").

[12] The *Sunal* rule does apply, however, to a defendant who had the opportunity to raise *Bailey* before his conviction became final, but failed to do so. Similarly, the *Sunal* rule may apply when a federal prisoner raises a claim for the first time in a § 2255 motion where the law had not yet crystallized to the point that advancing his claim on appeal would have been an exercise in futility. *See, e.g., United States v. Osser*, 864 F.2d 1056, 1061 (3d Cir. 1988) (denying writ of error coram nobis urging application of *McNally* because at the time of Osser's trial in 1972, there was no "entrenched precedent" that would have rendered a direct appeal on the mail-fraud point futile).

branded frivolous, as it was clearly precluded by a long line of Eighth Circuit precedent. That Bousley had *pleaded guilty* to the § 924(c) offense would have made any such challenge on appeal all the more untenable before *Bailey* was decided. For these reasons, Bousley did not have a full and fair opportunity to litigate his challenge to his § 924(c) conviction. *Cf. Stone v. Powell*, 428 U.S. 465 (1976).

To hold that Bousley nonetheless was required to advance such a futile claim on appeal or face procedural default would effectively oblige defendants to submit endless laundry lists of pointless claims on appeal in the desperate hope that some day, one of those claims might prove meritorious as a result of an unpredicted change in law. That would be a regrettable waste of the scarce resources of both the litigants and the courts.

This Court's recent decision in *Johnson v. United States*, 117 S. Ct. 1544 (1997), albeit a plain-error case, lends further credence to the notion that Bousley and other prisoners in his position have not defaulted their *Bailey* claims by failing to raise pointless arguments on direct appeal. In *Johnson*, the government argued that for an error to be deemed "plain" or "obvious," for purposes of the second prong of the plain-error standard, it must have been so both at the time of trial and at the time of appellate consideration. Accordingly, the government contended, the defendant should have objected at trial to the court's deciding the issue of materiality, even though near-uniform precedent both from the Supreme Court and from the courts of appeals had held that course proper. *Id.* at 1549. This Court declined to impose such an onerous and wasteful burden upon defendants:

> Petitioner, on the other hand, urges that such a rule would result in counsel's inevitably making a long and virtually useless laundry list of objections to rulings that were plainly supported by existing precedent. We agree with petitioner on this point, and hold that in a case such as

> this—where the law at the time of trial was settled and clearly contrary to the law at the time of appeal—it is enough that an error be "plain" at the time of appellate consideration.

Id. By the same token, where, as here, clear and controlling precedent would preclude a particular claim if raised on appeal, a petitioner may properly raise the claim based on intervening law for the first time in a § 2255 motion without fear of procedural default.[13]

If anything, this Court has frequently referred to the *Sunal* rule that a collateral attack will not "do service for an appeal," not so much as justification for denying the petitioner the right to *raise* his claim in a § 2255 motion, but as reason for the stricter standard set for actually *obtaining* collateral relief. *See, e.g., United States v. Addonizio,* 442 U.S. 178, 184 (1979) ("It has, of course, long been settled law that an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment."). Regardless of whether a defendant has defaulted his claim by raising it for the first time in a § 2255 motion, that claim may not be cognizable under § 2255 because it is not based on a "fundamental defect" rising to the level of a "complete miscarriage of justice." *See, e.g., id.* at 186-88; *see also* Part I, Section A(2) & cases cited in n.4, *supra.* The governing standard for when an intervening interpretation of law is sufficiently fundamental to be cognizable under § 2255 is supplied by *Davis v. United States,* 417 U.S. 333 (1974), and its progeny, however, and not by the rules governing procedural default.

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[13] *See also Ingber v. Enzor,* 841 F.2d 450, 454-55 (2d Cir. 1988) ("Were we to penalize Ingber for failing to challenge such entrenched precedent, we would ascribe to attorneys and their clients the power to prognosticate with greater precision than the judges of this court. Such a rule would encourage appeal of even well-settled points of law. We see no value in imposing a responsibility to pursue such a 'patently futile' course."); *English v. United States,* 42 F.3d 473, 479 (9th Cir. 1994).

B. Petitioner Has Shown "Cause and Prejudice" and a "Miscarriage of Justice."

Even assuming that his *Bailey* claim is subject to procedural default, Bousley easily satisfies the "cause and prejudice" standard for excusing such a default. Alternatively, his claim establishes the requisite miscarriage of justice justifying review on the merits of his claim, regardless of the existence of cause and prejudice.

1. In finding that Bousley failed to show "cause" for his default, the court below overlooked the most obvious "cause" for Bousley's failure to assert on direct appeal that his conviction was invalid—that is, that Bousley's *Bailey* claim was "so novel that its legal basis [was] not reasonably available to counsel." *Reed v. Ross,* 468 U.S. 1, 16 (1984). Counsel lacks a "reasonable basis" upon which to develop a legal theory when, as here, a decision of this Court overturns "a longstanding and widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved." *Id.* at 17.

This Court's interpretation of § 924(c) in *Bailey* was not reasonably available to Bousley during the period for taking a direct appeal. In light of the substantial body of adverse precedent law in his own circuit and the dearth of favorable case law on which to rely from other jurisdictions, *see* Part II, Section A, *supra,* Bousley lacked the tools with which to construct his present claim and accordingly, has shown "cause" for his failure to do so. *Cf. Engle v. Isaac,* 456 U.S. 107, 131-33 (1982) (concluding that the state prisoner had the necessary tools to assert his claim and for that reason, had failed to demonstrate "cause"). It is not simply a matter of whether *Bailey* would have made counsel's task "easier," but rather, that before *Bailey,* the claim was not "available" at all. *Smith v. Murray,* 477 U.S. 527, 537 (1986). The court of appeals below offered no explanation for its failure to find "cause" in spite of *Reed,* its own case law to the contrary, *e.g., Dalton v. United States,* 862 F.2d 1307, 1310 (8th Cir. 1988), and the substantial

body of decisions from other jurisdictions that have relied on *Reed* to reach the merits of *Bailey* claims on collateral review.[14]

Manifestly, Bousley also demonstrates actual prejudice. His inability to predict this Court's construction of § 924(c) in *Bailey* led directly to his conviction and sentence on a record that reflected neither the requisite "active employment" of a firearm nor the required understanding of the elements of the offense. *See United States v. Frady*, 456 U.S. 152, 172 (1982) (explaining that "prejudice" is satisfied if it appears that the error created a "substantial likelihood" that the result otherwise would have been different).

2. Alternatively, as the government concedes, the Eighth Circuit erred in failing to consider whether Bousley was entitled to collateral review because "he falls within the 'narrow class of cases . . . implicating a fundamental miscarriage of justice.'" *Schlup v. Delo*, 513 U.S. 298, 315 (1995) (citation omitted); *see* Brief for the United States on Petition for a Writ of Certiorari, at 10-11. To show that his is the "extraordinary case" meriting relief, *Schlup*, 513 U.S. at 321, Bousley must show that constitutional error "has probably resulted in the conviction of one who is actually innocent." *Id.* at 327 (quoting *Murray v. Carrier*, 477 U.S. 478, 496 (1986)). Devoid as it is of any suggestion that Bousley actively employed a firearm, the record in this case demonstrates on its face that Bousley satisfies this narrow exception. Even the Eighth Circuit (when ordered to reconsider the matter by this Court) has recognized, albeit in a plain-error case, that a conviction predicated on an incorrect understanding of the definition of "use" under § 924(c) gives rise to a miscarriage of justice "because it resulted in the conviction of a person who was not guilty of the crime with which he was charged."

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[14] *See, e.g., Triestman v. United States*, 124 F.3d 361, 1997 U.S. App. LEXIS 22752, at *21 n.8 (2d Cir. 1997); *United States v. Holland*, 116 F.3d 1353, 1356 (10th Cir.), *cert. denied*, 66 U.S.L.W. 3262 (U.S. 1997); *Abreu v. United States*, 911 F. Supp. 203, 207 (E.D. Va. 1996).

United States v. McKinney, 120 F.3d 132 (8th Cir. 1997); *see also* Part I, Section A, *supra*.

Accordingly, Bousley is entitled to consideration on the merits of his § 2255 claim regardless of whether he has shown sufficient "cause" for any default.

III. THAT PETITIONER WAS CONVICTED BY MEANS OF A GUILTY PLEA DOES NOT AFFECT THE VIABILITY OF HIS CLAIM.

Finally, the fact that Bousley pleaded guilty to "use" of a firearm under § 924(c) is no basis for denying him relief. Contrary to the view of the court below, by pleading guilty the petitioner did not "waive" his right to challenge his conviction on collateral review. To convict and punish a defendant for conduct that is not a crime constitutes a most basic denial of due process, one that our laws and judicial system will not countenance, regardless of whether the conviction is procured by verdict or by plea. When, on the basis of an existing record, a prisoner asserts his right "not to be haled into court at all" upon the charge to which he pleaded guilty, even a valid guilty plea will not stand in the way of his obtaining relief. In any event, as Bousley maintains, his guilty plea was not valid.

A. A Conviction and Sentence Based on Even a Valid Guilty Plea Should Be Vacated If Based on Conduct That the Law Does Not Make Criminal.

In one of the Court's more recent pronouncements on the availability of collateral relief from a conviction secured by a guilty plea, this Court held that the petitioners were not entitled to assert double jeopardy claims in a collateral attack upon their convictions, where they could not prove their claim by relying on the indictments and the existing record. *United States v. Broce*, 488 U.S. 563, 576 (1989). Both the outcome and reasoning of *Broce* are readily distinguishable from Bousley's claim that on the face of the existing record and as a matter of law, he is innocent of the crime to which he pleaded

guilty.

This Court explained in *Broce* that because "[a] plea of guilty and the ensuing conviction comprehend all of the factual and legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence," a prisoner who seeks to reopen the proceedings after pleading guilty is "ordinarily" confined to challenging whether the underlying plea was "both counseled and voluntary." *Id.* at 569. In this case, however, the Court need not determine that Bousley's plea was invalid (because involuntary or uncounseled), as a prerequisite to granting him collateral relief. *Broce* did not address the situation present here, in which a subsequent controlling decision interpreting the statute of conviction establishes that on the *face of the existing record* the defendant's conviction is for conduct that the law does not make criminal.

In both *Blackledge v. Perry*, 417 U.S. 21 (1974), and *Menna v. New York*, 423 U.S. 61 (1975) (per curiam), the Court recognized that defendants who plead guilty do not thereby waive the right to attack their convictions on grounds that implicate the court's power to enter the conviction or impose the sentence in the first place. In *Broce*, the Court affirmed the continued validity of that exception. 488 U.S. at 574-76. Because "on the face of the record, the court had no power to enter the conviction or impose the sentence," *id.* at 569, Bousley is entitled to vacation of his § 924(c) conviction and sentence regardless of the validity of the underlying plea.

In *Blackledge*, the Court granted a writ of habeas corpus sought by a state prisoner who had pleaded guilty to a felony indictment filed after the prisoner had exercised his right to appeal de novo his misdemeanor conviction for the very same conduct. The Court held that the state's action in filing a felony indictment in these circumstances created a potential for vindictiveness that was inconsistent with the dictates of due process. 417 U.S. at 28-29. The Court held that Perry's guilty plea did not waive his due process challenge to the conviction. In so ruling, the Court distinguished its refusal to entertain the

defendants' claims attacking their guilty pleas in *Tollett v. Henderson*, 411 U.S. 258 (1973), and in the *Brady* trilogy,[15] because unlike those defendants, Perry was "not complaining of 'antecedent constitutional violations' or of a 'deprivation of constitutional rights that occurred prior to the entry of the guilty plea.' Rather, the right that he asserts and that we today accept is the right not to be haled into court at all upon the felony charge." *Blackledge*, 417 U.S. at 30 (quoting *Tollett*, 411 U.S. at 266, 267).

Similarly, in *Menna*, the defendant sought to set aside his conviction, notwithstanding his guilty plea, because the Double Jeopardy Clause precluded his conviction altogether. This Court agreed, ruling that where the government is precluded from "haling a defendant into court on a charge, federal law requires that a conviction on that charge be set aside even if the conviction was entered pursuant to a counseled plea of guilty." 423 U.S. at 62. The Court did not rule that a double jeopardy claim may never be waived, but held simply "that a plea of guilty to a charge does not waive a claim that—judged on its face—the charge is one which the State may not constitutionally prosecute." *Id.* at 62 n.2.

A comparison of the results in *Menna* and *Broce* is instructive. In both cases, the defendants pleaded guilty and thereafter sought to set aside their convictions on double jeopardy grounds. The defendant in *Menna* was successful because the record established on its face that the Double Jeopardy Clause barred the defendant's prosecution. As the Court explained in *Broce*, in neither *Blackledge* nor *Menna* did the defendants seek further proceedings at which to expand the record with new evidence. In both cases, the existing record was sufficient to demonstrate that the defendants' claims were meritorious. *Broce*, 488 U.S. at 575. In *Blackledge*, "the

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[15] *See Parker v. North Carolina*, 397 U.S. 790 (1970); *McMann v. Richardson*, 397 U.S. 759 (1970); *Brady v. United States*, 397 U.S. 742 (1970).

concessions implicit in the defendant's guilty plea were simply irrelevant," while in *Menna*, the indictment was "facially duplicative" of the earlier offense of which the defendant had been convicted and sentenced. *Id.*

By contrast, the petitioners in *Broce* pleaded guilty to indictments that on their face described separate conspiracies, and thus they could not prove their double jeopardy claim "by relying on those indictments and the existing record." *Id.* at 576. Indeed, the petitioners in *Broce* could not have prevailed "without contradicting those indictments," a course of action precluded by the admissions inherent in their guilty pleas. *Id.*

The exception outlined in *Broce*, *Menna*, and *Blackledge* is fully applicable here. Bousley's claim rests entirely on the *existing* record, chiefly the plea agreement and plea colloquy, which establish that the plea was based on Bousley's ownership and possession of firearms and not on any evidence of active employment. Thus, there is no need to conduct further proceedings to develop evidence outside the record; the record speaks for itself. As in *Blackledge*, "the concessions implicit in the defendant's guilty plea"—*i.e.*, that Bousley "possessed" the firearms and that they were "available"—were "simply irrelevant," *Broce*, 488 U.S. at 575, to the question whether Bousley was guilty of having "used" a firearm in violation of § 924(c).

In pleading guilty, Bousley may have waived a challenge to the facts themselves, but he did not waive his right to contest whether those facts were sufficient to constitute a crime.[16] "[N]o matter how validly his factual guilt [was] established," *Menna*, 423 U.S. at 62 n.2, a petitioner's guilty plea does not waive a claim that his conviction is unconstitutional "if the facts he pled guilty to are subsequently

[16] *Lee v. United States*, 113 F.3d 73, 75 (7th Cir. 1997) (granting collateral relief based on *Bailey*, notwithstanding guilty plea); *accord Stanback v. United States*, 113 F.3d 651, 655 (7th Cir. 1997) (same).

determined not to be criminal." *United States v. Barnhardt*, 93 F.3d 706, 708 (10th Cir. 1996) (*Bailey* claim may be raised in a § 2255 motion despite guilty plea).[17] Indeed, the federal courts historically have voided convictions when this type of fundamental defect has arisen. *See, e.g., Mossew v. United States*, 266 F. 18, 20 (2d Cir. 1920) ("We are of the opinion that no crime is charged in this indictment. Therefore the conviction, even though upon plaintiff in error's plea of guilty, is void."); *cf. Ex Parte Lange*, 85 U.S. (18 Wall.) 163, 178 (1874) (granting writ of habeas corpus where the sentence of the circuit court was "pronounced without authority").

Bousley's continued incarceration for an offense of which he is innocent violates the most basic principles of substantive[18] and procedural[19] due process. Incarceration of an innocent individual likewise constitutes "cruel and unusual

[17] *Accord United States v. Andrade*, 83 F.3d 729, 731 (5th Cir. 1996); *United States v. Farley*, No. 96-3002, 1996 U.S. App. LEXIS 24208, at *8 (6th Cir. Aug. 27, 1996) (per curiam); *see also United States v. Caperell*, 938 F.2d 975, 977-78 (9th Cir. 1991); *United States v. Barboa*, 777 F.2d 1420, 1422-23 & n.3 (10th Cir. 1985).

[18] *See United States v. Briggs*, 939 F.2d 222, 228 (5th Cir. 1991) ("Simply put, to convict someone of a crime on the basis of conduct that does not constitute the crime offends the basic notions of justice and fair play embodied in the Constitution."); *Johnson v. United States*, 805 F.2d 1284, 1288 (7th Cir. 1986) ("To punish a person criminally for an act that is not a crime would seem the quintessence of denying due process of law. . . ."); *cf. Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort . . . .") (citing *North Carolina v. Pearce*, 395 U.S. 711, 738 (1969) (Black, J.)).

[19] *See Thompson v. City of Louisville*, 362 U.S. 199, 206 (1960) ("Just as 'Conviction upon a charge not made would be sheer denial of due process,' so is it a violation of due process to convict and punish a man without evidence of his guilt") (footnote and citations omitted); *see also Jackson v. Virginia*, 443 U.S. 307 (1979); *Vachon v. New Hampshire*, 414 U.S. 478, 480 (1974) (per curiam); *In re Winship*, 397 U.S. 358 (1970).

punishment" under the Eighth Amendment, for such infliction of unnecessary and unjustified suffering is "inconsistent with contemporary standards of decency."[20]

The government has no legitimate penal interest in continuing to imprison Bousley for his conduct, and accordingly, Bousley's conviction and sentence under § 924(c) should be vacated.

B. Petitioner's Guilty Plea Was Invalid.

Although this Court should remand this case for vacatur of Bousley's conviction and sentence without regard to the validity of his guilty plea, Bousley is correct in suggesting that his plea in fact was not knowing and voluntary. The government agrees. *See* Brief for the United States on Petition for a Writ of Certiorari, at 8-9.

This Court has explained that a plea may be involuntary because the defendant "has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt. Without adequate notice of the nature of the charge against him, or proof that he in fact understood the charge, the plea cannot be voluntary in this . . . sense." *Henderson v. Morgan*, 426 U.S. 637, 645 (1976); *accord Marshall v. Lonberger*, 459 U.S. 422, 436 (1983); *see also McCarthy v. United States*, 394 U.S. 459, 466 (1969) (a guilty plea cannot be truly voluntary "unless the defendant possesses an understanding of the law in relation to the facts").

Accordingly, the voluntariness requirement is not satisfied unless the defendant has "received 'real notice of the true nature of the charge against him.'" *Henderson*, 426 U.S. at 645 (citation omitted). For that reason, the Court in *Henderson* affirmed the grant of a writ of habeas corpus where the

[20] *Estelle v. Gamble*, 429 U.S. 97, 103 (1976); *see Robinson v. California*, 370 U.S. 660, 667 (1962) ("Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold.").

petitioner had not been informed that intent to cause death to the victim was an element of the offense. *Id.* at 645-46. Similarly, because the plea colloquy reflects that Bousley incorrectly believed that he could be convicted under § 924(c) based solely on his "possession" of a weapon, Transcript, at 3, his guilty plea clearly was not "voluntary in a constitutional sense," *Henderson*, 426 U.S. at 645, and cannot withstand collateral attack. *See Kercheval v. United States*, 274 U.S. 220, 224 (1927) ("[T]he court will vacate a plea of guilty shown to have been unfairly obtained or given through ignorance, fear or inadvertence.").

Of course, not every guilty plea that is based on a misapprehension of the governing law must be vacated. *Compare Brady v. United States*, 397 U.S. 742, 757 (1970) (refusing to disturb a guilty plea that was based on a mistaken fear that the death penalty was available). Brady's claim that his plea was involuntary rested solely upon his misunderstanding of the anticipated *costs* of not pleading guilty. In *Brady*, however, unlike here, the defendant had been adequately and accurately informed of the elements of the charged offense. Brady's "strategic miscalculations concerning the evidentiary strength of the government's case or concerning the penalties that may be imposed upon conviction . . . did 'not impugn the truth or reliability of his plea.'" *United States v. Brown*, 117 F.3d 471, 478 (11th Cir. 1997) (quoting *Brady*, 397 U.S. at 757).[21]

By contrast, Bousley's guilty plea itself is wholly

[21] By the same token, the fact that a defendant may plead guilty and consent to punishment despite his claim of innocence, *see North Carolina v. Alford*, 400 U.S. 25 (1970), is no reason to permit Bousley's conviction to stand. "Because of the importance of protecting the innocent and of insuring that guilty pleas are a product of free and intelligent choice," even an *Alford* plea may not be accepted "unless there is a factual basis for the plea." *Id.* at 38 n.10. There is no such factual basis here. And of course, an individual entering an *Alford* plea must "voluntarily, knowingly, and understandingly" consent to punishment, *id.* at 37; Bousley did not.

unreliable. That the guilty plea and plea agreement were the product of "negotiation and concession," as the court of appeals put it, Pet. App. 4,[22] is no reason to refrain from scrutinizing the validity of the plea. While this Court frequently has recognized the importance of plea bargaining to the administration of justice, *see Santobello v. New York*, 404 U.S. 257, 260 (1971), the mere existence of a plea agreement cannot foreclose a challenge to a conviction and sentence that were not authorized by the criminal statute under which a defendant has been convicted or that were procured by an involuntary plea.

Thus, Bousley's guilty plea—whether valid or not—does not bar him from obtaining relief pursuant to § 2255 to remedy this fundamental miscarriage of justice.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to reverse the judgment of the court of appeals.

Respectfully submitted,

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[22] The court noted that in exchange for his plea of guilty, Bousley was afforded the "opportunity" to contest at sentencing the amount of drugs for which he would be held accountable. Pet. App. 4. This was hardly a "concession," *id.*, for even a defendant who pleads guilty is entitled to have the court determine the appropriate sentence.